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Losing One's Mind: Bootlegging and the
Sociology of Copyright

by

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A thesis submitted in fulfilment of the requirements for
the degree of Doctor of Philosophy in Sociology

University of Warwick, Department of Sociology

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*With the intention of depriving authors of
the honest, the dear-bought reward of
their literary labours, they have been
raised a little higher instead of a little
lower than the angels.*

Catharine MacCauley, 'A Modest Plea for the
Property of Copyright', 1774.

*I been double crossed too much,
At times I think I've almost lost my mind.*

Bob Dylan, 'Idiot Wind', 1974.

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Declaration

Given the nature and topic of this thesis, it is with notable irony that I hereby declare it to be all my own work. Neither has the thesis been submitted for a degree at any other university.

Abstract

This thesis offers a sociological analysis of authorship and copyright. It analyses how a specific model of authorship (characterised as ‘Romantic’) has come to form the foundation for understanding copyright even though such an understanding does not have any basis in the original purposes of copyright. This argument is then illustrated with a case study of an area of popular music known as ‘bootlegging’.

The thesis begins with a discussion of the early history of copyright law. It is argued that, rather than being for the benefit of authors, copyright was initially intended as a means of securing public education. On the basis of this discussion it is argued that copyright is a relationship between three interests – authors, public and publisher – but that the rhetorical uses of authorship prove especially critical for understanding copyright as a social phenomenon. The thesis goes on to investigate why Romanticism and copyright should be so intimately linked, relating copyright to notions of individuality and immortality, and what problems this understanding of authorship causes. In particular, it is argued that the public interest, the intended beneficiary of copyright law, has been diminished because of the dominance of Romantic authorship. The thesis then offers some alternative conceptualisations of both creativity and copyright.

This argument is then illustrated by a case study of the popular music industry. This section of the thesis begins by examining the dominance of Romantic ideals within rock music ideology and discusses the ‘functions’ of Romanticism for both the music industry and copyright industries more generally. The case study looks at the phenomenon of bootlegging (the commercial release of live performances and outtakes by individuals other than the rights holders) as an exemplar of the trends under discussion. The case study is structured around the question of why bootlegging is viewed as a problem by the legitimate record industry when it is of minimal economic impact. It is suggested that the answer to this puzzle is that bootlegging poses an explicit challenge to Romantic authorship. However, the thesis concludes that bootlegging not only contests but in its own way also reproduces the Romantic idea of authorship.

List of Abbreviations

A&R	Artists and Repertoire
AOR	Adult Oriented Rock
BPI	British Phonographic Industry
CDR	Compact Disc – Recordable
DAT	Digital Audio Tape
IFPI	International Federation of Phonographic Industries
GATT	General Agreement on Tariffs and Trade
GEMA	German copyright collecting society
GWW	‘Great White Wonder’
MP3	Mpeg layer 3
NAFTA	North American Free Trade Agreement
RIAA	Recording Industry Association of America
SIAE	Italian copyright collecting society
TRIPs	Trade Related aspects of Intellectual Property
URAA	Uruguay Round Agreement Act (US)
VARA	Visual Artists’ Rights Act (US)
WIPO	World Intellectual Property Organisation

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Introduction

This thesis is a sociological examination of the concepts of authorship and copyright. The theoretical understanding described in the first half of the thesis is based on the history of copyright in three different countries; the UK, France and the United States. This understanding is then illustrated by a substantive case study on a little studied area of popular music known as bootlegging. As well as shedding some light on a largely neglected area of academic study, bootlegging also works as a paradigm case of the arguments made in this thesis regarding the relationship between authorship and copyright.

It is generally understood that copyright exists for the protection and benefit of the author in order to encourage creativity. It is thus tempting to analyse copyright from a perspective that sees its history as following a linear, unimpeded development from its early days as a trade regulation into the full blossoming of authorial protection today. Clauses and regulations that were developed for short term political or economic motives are seen as containing the seeds of author-awareness, even though actors may not have understood their meaning at the time.¹ This way of understanding, which does not fully appreciate the historical differences between different national copyright laws, sees a progression to one 'correct' version of copyright.

This thesis is situated in a body of work that rejects such a perspective. Beginning with Foucault's famous challenge in 1969,² this diffuse body of literature points out that the understanding of authorship that many people (including legislators and judges) take for granted is itself socially constructed.³ Rather than being the one natural and unquestionable mode of artistic (and particularly, literary) production, there are actually varying methods of creation, and varying methods of comprehending these creations. Similarly, there is a body of work that points out that the history of copyright is not a neat linear development, but a history of compromise full of short term motives, many less high-minded than the protection of genius.⁴

This work, therefore, argues against any author-centred, teleological analysis of copyright: there is no necessary relationship between copyright and authors' rights and copyright is not obliged to protect the rights of authors. This is not, however, to agree with the stronger deconstructivist claims of those such as Saunders and Ginsburg that an

¹ For an example, see chapter 1 note 29.

² 'What is an author?', in Foucault, 1984, pp.101-120.

³ For example, work by Martha Woodmansee, Peter Jaszi, James Boyle and Jack Stiller.

⁴ For example, Saunders (1992), Ginsburg (1990) and Litman (1987) (on US 1976 Copyright Act).

analysis of copyright must therefore be limited to small scale descriptions of narrow political struggles. Despite variations in the histories of copyright in the three different nations analysed here, there are certain themes that arise in each and any sociological analysis must begin to draw out the themes from the differences. There are two key themes to which I wish to draw attention in this thesis.

The first of these is that in each of the countries under discussion there is a rhetorical elevation of a certain ideal of authorship – which I characterise as ‘Romantic’ – to the centre of copyright debate and practice.⁵ What is interesting is that despite the prominent role the figure of the author has in the development of copyright, it has often been a subsidiary category, utilised as a stalking horse for the interests of others rather than an autonomous figure in its own right. Because of this we find that authorship has been used in slightly different contexts in each country, posited in a variety of antagonistic or complementary relationships.

One issue that this subsidiary character of authorship raises (and which is extremely important to this thesis) is the relationship between rhetoric and interest: the conception of authorship that developed during the Romantic period is partly the result of the material conditions of the artists themselves,⁶ but the elevation of authors’ rights in copyright has not always been of benefit to authors and it needed more than merely authors’ voices for the conception to have such an impact. That publishers began to use the notion of authors’ rights in the late eighteenth century represents a changing understanding of their own interests: they had traditionally been hostile to authors’ rights but, as publishers sought to secure perpetual copyright, the mechanism which they utilised was the notion of authors’ rights coupled with the inviolability of free contract. This rhetorical device is still used by publishers today.

The second, related, issue that I wish to draw out is that throughout the history of copyright, the interests of the public, originally a very high priority for copyright legislators, has significantly diminished. Although used in slightly different contexts in each country, the public interest was an extremely important factor in early copyright legislations: in the UK, the public interest was used as a way of limiting publishers’ monopolies; in France, the author was viewed as a public servant delivering Enlightenment progress to the public; while in the US, public learning was the sole reason for instigating a system of copyright. However, the importance of the public – symbolically characterised by the public domain – has diminished in copyright in inverse

⁵ In an attempt to constantly reiterate the socially constructed nature of authorship, I have used a capital R to begin Romantic throughout this thesis, rather than the traditional lower case.

proportion to the elevation of the Romantic author. The story of the increasing usage of authors' rights by publishers has a corollary in a story of a decreasing public right.

What is copyright?

Although there was a broad understanding of such a concept, the word 'copyright' does not appear anywhere until 1709, though there is a mention of a 'Copy Right' in 1678.⁷ In the preceding years, the word 'copie' was taken to mean both the physical manuscript itself and the right to copy it. The idea of copyright existing apart from the physical manuscript grew out of philosophical debates over the nature of literary property in the eighteenth and nineteenth centuries.

Copyright, as its name suggests, is the right to copy. It is not a property right in a thing, but an economic mechanism that reflects what in economic theory is known as a 'public good problem'. A public good is one for which a wide dispersal is publicly beneficial, but one for which the cost of reproduction is very low once it has been produced (i.e. it can be easily copied). Because of the low reproduction costs, there is no economic incentive for a producer to produce the initial public good, as her competitors will quickly copy her product and gain a market advantage of lower marginal production costs. If no producer will risk producing the initial copy, then there will be no public good. Copyright thus exists to offer relative economic security to the initial producer so that she will produce the public good. Copyright should not be understood as a property right: the property right rests in ownership of the manuscript or CD the same as any other object. The purchaser of a CD can lend that disc to friends, listen to it or smash it as they see fit. What they cannot do, and what the copyright holder can, is make a copy of it. The exact nature of the 'property' owned under copyright was the source of much philosophical and juridic debate in the formation of modern intellectual property law. This included the development of the idea of the work as something that is intangible and separable from the actual manuscript, and it is this immaterial 'work' that is protectable under copyright. I shall draw on the debates concerning the precise nature of intellectual/intangible/immaterial property as needed in this thesis, but they are not the central focus of this work. Rather, the focus of this thesis is how the uses and understandings of authorship have shaped copyright. My analysis is not of authorship *per se*, but of its practical uses and understandings in relation to copyright.

⁶ Woodmansee, 1994; Frith and Horne, 1987, pp.31-35; Williams, 1993, pp.30-47.

⁷ Feather, 1994a, p.46.

The question of exactly what was the nature and source of the right bestowed by copyright is the focus of much of the historical background that I discuss in this thesis. This question of the source of the copyright is key because it decides *what copyright is*. There are two competing explanations of the nature of copyright. The first of these is that the author has a natural property right in the work that he or she creates. While some supporters use a Lockean labour theory to support this view, other writers argue that such a theory is inadequate to fully credit the relationship that an author has to the product of his labour. The understanding that an author has a natural right in her work is used to support the view that this right is a property right, and is therefore perpetual like any other property right. In the arguments of those such as Wordsworth, authorial property is founded on an *a fortiori* argument relating to the perpetual right of property: if a property right in ordinary property is eternal then *a fortiori* the right in literary property must also be perpetual. In the late eighteenth century, when their statutory period of copyright protection had expired, publishers in both France and the UK relied upon this notion of the natural rights of authors (and the alienability of such rights through contract) in an attempt to secure a perpetual copyright in the works that they owned.

If the author's natural law right is seen as the source of the right to copy, then copyright is merely the statutory affirmation of a prior right. Copyright is a confirmation that the state will protect that right for a designated period, not the source of the right itself. Under this understanding, the right does not expire after the statutory time limit (because natural rights cannot be temporally limited) but continues to be protected forever under common law. By contrast, the opposing view concerning the source of an author's right is that copyright is solely a right created by statute: it is a positive right, not an affirmation of an anterior right. A right in copies does not exist until granted by the state. In this second understanding, copyright is granted only for a specific period of time as designated by the state, and there is no common law protection in perpetuity.

One practical issue that reflects the natural right/positive right dilemma in copyright is that of registration and deposit. The issue of registration is of fundamental importance to the determination of literary property and proved to be a judicial controversy in all three countries. Many early copyright cases were dismissed on the grounds that the book in question had not been registered for copyright or had not been deposited at specified libraries as required by copyright legislation. Despite Feather's suggestion that the issue of legal deposit of books was only combined with copyright

legislation by historical accident, the relationship is far more significant.⁸ If a government necessitates any form of action in order for a work to be eligible for copyright then copyright cannot be seen as emanating from the act of authorship itself: copyright only comes into being when the author enters into a relationship with society to publish her work. Copyright in this understanding does not stem from the natural rights of authors, as the state cannot necessitate conditions before it will protect a natural right. Publishers argued against the validity of such requirements on these grounds. In the US' most significant copyright case, *Wheaton v Peters*, Wheaton accepted that he had not followed the registration requirements necessary to gain copyright protection from the state, but he argued that he still had a common law copyright based in his natural rights that must be protected. If this view is taken (that copyright is the result of a natural right stemming from an artist's creativity) then *a priori* there is no need for registration as these rights exist from the moment of creation. This is the approach taken by the Berne Convention and is the primary reason that the US did not join Berne for over a hundred years. The unequivocal goal of US copyright was public access to learning. This was facilitated by registration and was incompatible with Berne's natural rights approach.

This debate between natural and positive right, and between registration and non-registration, is crucial for an understanding of copyright. The answer to the question of whether copyright is an affirmation of a natural law right or a positive right granted by the state has significant repercussions on the practicalities of copyright. In all three countries analysed here, it was at one point decided that copyright was not an affirmation of a natural right but a positive right created by the state: definitively in the UK and US, with slightly more ambiguity in France. However, while one would expect that this would result in a decrease in the importance of authors' rights in copyright as they are made subservient to the rights of the public, authors' rights have strengthened during the history of copyright. The reasons for this, as explained in this thesis, are the development of a Romantic idea of authorship combined with the rhetorical uses of such conceptions by authors, publishers and the public.

I shall elaborate more upon these ideas in chapter 1. Chapter 1 describes the historical background to copyright in the three countries and explains how copyright was initially conceptualised as a state grant to benefit the public. In chapter 2 I describe how, through twin processes of centralisation and elevation, the author became the central

⁸ Ibid., pp.7-8. Feather describes legal deposit as an 'essentially irrelevant matter'.

figure in copyright. This is done primarily through an investigation of William Wordsworth, one of the most famous Romantics. Wordsworth was preoccupied with copyright through much of his life and was instrumental in the build up to the UK 1842 copyright act which granted a *post mortem* term of protection in the UK for the first time. In chapter 2, as well as detailing Wordsworth's dealings with copyright, I analyse why one of the most significant Romantics would be so concerned with a legal mechanism and suggest how copyright relates to notions of immortality and inheritance.

Wordsworth's writings offer a sophisticated understanding of the symbolic significance of copyright beyond mere economics. However, such sophisticated understandings have stagnated into what is today commonly understood to be Romanticism. This clichéd conception of Romanticism (which I characterise in this thesis as Bohemianism) and some of the reasons for its hegemonic impact, are described at the end of chapter 2.

Having made the argument that the centralisation of the Romantic author is crucial for developing an understanding of copyright, I address criticisms of such an argument in chapter 3. In this chapter, I also discuss possible alternatives for explaining copyright but argue that none have the explanatory power of the Romantic author before providing examples from recent American copyright, in support of this statement. In chapter 4, I shall discuss some of the problems that a Romantic conception of creativity has for copyright. Through the work of Adorno, Goldmann and Barthes, I then look at some alternative, perhaps more appropriate ways of conceptualising creativity and attempt to use their theories to provide alternative ways of conceptualising copyright that may lessen the problems of the current understanding.

To bring Romanticism out of the nineteenth century, and as one means of linking the two halves of this thesis, in chapter 5 I analyse the formal relationship between Bohemianism and rock music. This chapter highlights how the key features of Romanticism exist within the popular music industry and are one way of explaining how the relationship between Romanticism and copyright put forward in this thesis continues to manifest itself today. This relationship between copyright and authorship is discussed in detail in chapter 6.

The second half of the thesis offers a case study of bootleg records. Bootlegging (the release of live concerts and/or studio outtakes that have never been officially released) is a significant feature of popular music but has not been the subject of in depth academic study. One of the aims of this thesis is to begin to rectify that situation. This thesis includes interviews with bootleg collectors and bootleggers in an attempt both to

shed light on a subculture traditionally painted in a negative light, and to bring to life the arguments made regarding Romanticism and copyright.

The case study is structured around a seemingly puzzling aspect of bootlegging: *why does the record industry view bootlegs as such a major problem when they are of minimal economic significance?* In order to answer this question, the case study is structured by giving an overview of the central features of bootlegging (chapter 8) before discussing how the legitimate industry has responded to bootlegging (chapter 9). In chapter 10, by using Radin's theory of contested commodification, I attempt to answer the question posed and explain how bootlegging works as the exemplar of the relationship between authorship and copyright that was discussed earlier in the thesis. Finally, in an afterword, I question whether bootlegging has any future in the wake of contemporary legal and technological developments.

Chapter 1

Lessons from history: developing a framework to understand Copyright

Before copyright developed, books were printed under an order of royal privileges and grants providing rights in copies and stemmed from press control and censorship. Between the sixteenth and eighteenth centuries, in both France and England, the publishing industry centred around trade guilds. These institutions were extremely important to the development of the copyright system, particularly the Stationers' Company in England.¹ The Stationers (freemen of the company of Stationers of London) were reorganised in 1557 by a charter by Mary I which granted a virtual monopoly of printing in London and the Kingdom to the Company. In 1559, they took on responsibility for policing its trade, both economically and in terms of press control; a large obligation that the company took very seriously. To this end, it established the Stationers' Register; a register to record all licences to print (it is important to note at this time that the register could not *grant* a licence to print, which still came from the Crown). This registration became the norm and, despite the lack of statutory support, soon developed into a compulsory exercise. The company was allowed to institute its own bye-laws to govern the trade and thus, in practice, licences to print were soon being granted by the masters and the wardens of the guild who were deciding what was or was not fit to publish. The entry into the Stationers' Register was thus originally an acknowledgement that the book was fit to print and had been properly licensed.²

The licence, however, quickly began to expand into an exclusive right to print. In 1563-64 the register notes that John Sampson was fined twenty pence for printing 'other mens copyes'.³ 'Copies' (used to describe both the manuscript itself and its copying right) were soon being treated as property: the first recorded sale was in 1564 and the first joint registration of ownership was in 1566-67.⁴ By the end of the 1580s, it was commonly

¹ At this time, the Stationers were often referred to as 'booksellers'. In this section, I will use the word 'publishers' unless I am referring specifically to a situation involving the Stationers Company, and will refer to them as 'booksellers' only when necessary for historical detail. Calling them 'publishers' at this historical stage is slightly misleading, however, as the modern publishing industry only began to develop in the nineteenth century, but is consistent with the rest of the thesis.

² Feather, 1994a, p.17.

³ Ibid., p.17.

⁴ Ibid., p.18.

accepted that registration was an exclusive right to print and, in 1607, it was established that only a freeman of the company resident in London could own copies.⁵

There are two important issues to note here. The first is that once a copy was entered into the register, it was deemed the perpetual property of the owner. The second point is that authors are nowhere to be seen in this arrangement. The standard practice for authors was to sell their manuscript to a willing publisher. Once this transaction had occurred, the author had no rights in the work.⁶ At this time there was no conception of a literary property other than the physical manuscript and so the author sold his property interest when he sold his manuscript.

In France, pre-Revolutionary publishing was also ordered through a system of royal privileges. The earliest book privileges were granted in the early sixteenth century and were normally for a period of five to ten years.⁷ After this period, the book became free for any royally licensed publisher to copy. In 1566, because of increased censorship due to the religious wars, a royal privilege became a requirement for all first editions.

Late seventeenth century French publishing had its equivalent of the Stationer's Charter – the *Chambre Syndicale de la Librairie et Imprimerie de Paris* (the Paris Guild). The Guild was a self regulating body that enjoyed a monopoly on production and distribution of all printed matter in Paris. By the 1630s, monopolies longer than the customary decade had been created as, for no clear reason, the crown had begun to renew privileges. The Guild manipulated this change in policy and established strong monopolies on most books. In return for keeping the trade in order the Paris Guild, like its English counterpart, was rewarded by a secure monopoly in printing via a system of royal privileges.

In the 1640s, parliamentary concerns in England began to arise which had a lasting impact upon copyright. Before this point there had been a groundswell of opinion against monopolies but the act brought in to counter this – the 1624 monopolies act - had exempted printers due to a desire to restrain the press. It was the issue of press control that dominated political debate from the 1640s to the 1660s. While Parliament was concerned with keeping rein on the press, the Stationers were keen to get Parliament to legislate the continuation of

⁵ See *ibid.*, pp.22-26.

⁶ For an early example of such a contract (for Milton's *Paradise Lost*) see Lindenbaum, 1994.

⁷ Birn, 1970, p.136.

their long held rights in copies. These concerns were seen as separate, however, and it was those of Parliament that were dominant.⁸ During the turmoil of the 1640s and 1650s the importance of the Stationers diminished and, following the restoration of Charles II, the trade petitioned Parliament in an attempt to restore its position. However, in a bid to ensure their own commercial interests, the Stationers for the first time linked the issues of copy protection and censorship. A licensing bill was finally passed in 1662 which contained a number of innovations. It initiated the appointment of an official licenser and made entry into the Stationers' Register compulsory which, as the bye-laws governing the register were not statutory, had the effect of bringing copy protection under the aegis of the common law courts. The law was intended primarily to control the press, but the compulsion to enter a book into the Stationers' Register ensured the survival of the system of copy protection that had existed before the civil war.⁹

As long as the 1662 act was in force, the Stationers could ensure that all books were registered with them and thus all publishers were liable to all the rules of the company. The lapse of the act in 1678-79, however, precipitated a crisis for the trade. From 1678 onwards, the number of entries into the register declined dramatically and it was a huge relief to the stationers when James II's first Parliament re-enacted the bill for seven years from 1685. The act was renewed in 1693 but when the bill came up for a further renewal the following year a more principled opposition, centred around John Locke, had emerged that was opposed to commercial monopolies. He argued that the Stationer's monopoly was a hindrance to publication, particularly publishers taking rights in ancient authors and preventing their importation or reprinting (this was related to Locke's unsuccessful attempts to publish a version of Aesop). Locke successfully lobbied parliamentary allies and the bill was defeated in 1695. The industry was caught by surprise.

The Statute of Anne

The final lapse of the 1662 act was a cataclysmic event for the printing industry. Much of the carefully erected structure protecting their commercial interests was swept away. There were no longer any restrictions on the number of printers or their location, no restrictions on the number of journeymen and apprentices, and no restrictions on the import

⁸ Feather, 1994a, pp.39-40.

of books. Most importantly, there was no legal necessity to enter a book into the Stationers' Register and, given the lack of any unambiguous precedent, no guarantee that any court would uphold their rights.¹⁰

The trade thus immediately petitioned for a new bill but it was lost in the Lords; the first of fifteen such bills between 1695 and 1710. Politicians were still interested in controlling the press but, due to the number of competing interests and ideologies, reviving the licensing system was impossible.

The publishers engaged Daniel Defoe to write a pamphlet defending the rights of the Company.¹¹ This followed a moderate Tory line on press control, arguing that all writers should place their name on a work to make them accountable. However, the concomitant of this was a conception of authorial property, the first such mention in England.¹² Defoe argued that a law such as the publishers were seeking would reflect 'an undoubted exclusive Right [of the author] to the property of [the work].'¹³ Despite this early mention of authorial property, the concept was not common at the time and the publishers, fearing that their position *vis a vis* authors would be weakened, did not seek to promote the notion of authors' rights to defend their property.¹⁴ Defoe's work did open up an alternative line of argument for them, however, and they began to stress what Defoe termed the 'encouragement of learning'. Protection of copies was necessary, they argued, to encourage the publication of works 'that might be of great Use to the Publick'.¹⁵

Defoe's work hints at some form of authorial consciousness. However, it is important to note that any authorial awareness at this point was ill-defined and was entirely concerned with matters of 'propriety' rather than 'property'.¹⁶ Indeed, prior to the eighteenth century, books were often published with an introduction stating that it was unauthorised, as there was a great stigma for authors to be attached with the commercial sphere. In reality

⁹ Ibid., p.44.

¹⁰ Ibid., p.50.

¹¹ *An Essay on the Regulation of the Press*, 1704.

¹² Rose, 1993, p.35.

¹³ Quoted in *ibid.*

¹⁴ Feather describes it as 'an unusual perception at a time when the whole public debate had revolved around censorship on the one hand, and the property rights of publishers on the other.' 1994a, p.56.

¹⁵ Stationers petition to Parliament, 1707. It should be noted that the publishers did gingerly begin to use a concept of authors' rights at this time (suggesting the current situation deterred authors from writing) but, unlike later in the century, did not utilise it as their chief argument for copyright protection. The concept of authorship as we now know it had only just begun to develop by the first decade of the eighteenth century.

¹⁶ Rose, 1993, pp.18-30.

there seem to have been very few unauthorised publications; most publishers acknowledged the right of the author to be the first owner of his work and thus sought permission before publishing, paying ‘copy money’ if appropriate. Any early understandings of the rights of authors in England seem to have been based on a notion of the sanctity of the text. In the seventeenth century the King’s Men regularly petitioned to prevent the publication of their plays because of what they saw as detrimental editing. In general, however, publishers often listened to authors’ wishes regarding alterations to new additions and would sometimes pay an extra amount to authors of popular books for a second print run if no amount had been agreed prior.

Rose argues that it is this initial conception of authorial ‘propriety’ that formed the basis of the development of the property owning author in the eighteenth and nineteenth centuries. Indeed, Rose points out that ‘propriety’ was still used to refer to ‘property’ as late as 1643.¹⁷ He also highlights that when authors did write anything to defend their authorial propriety, they often used developing commercial metaphors (particularly taxation and monopoly) to describe their authorial rights. But despite these flutterings of authorial consciousness, authors had no clearly defined rights before 1710 and any half formed rights that they may have had did not revolve around the ownership of property.

Although publishers may not have been keen on the developing conception of authorial ‘property’ in 1709, legislators saw it as a way of limiting the commercial monopoly of the publishers. The tone of the bill introduced in 1709 had changed dramatically from the earlier licensing bills. The preamble referred to an author’s ‘undoubted Property of such Books and Writings as the product of their learning and labour’.¹⁸ This bill was seemingly intended for the protection of authors. The trade, concerned about losing its strong contractual position with authors, lobbied Parliament and achieved its aims. Many amendments to the bill were made which ‘clearly reflect the success of the trade’s lobbying and petitioning.’¹⁹ There was no longer any mention of the author in the preamble, let alone his ‘undoubted property’. The new preamble made it clear that the bill was only concerned with protecting a piece of property which was owned and controlled by the publishers. As Feather states, the trade ‘had succeeded in watering down

¹⁷ Ibid., p.18, fn.4.

¹⁸ Quoted in *ibid.*, p.59.

¹⁹ Feather, 1994a, p.61.

the original proposals to the point at which authors had their existence acknowledged but their rights undefined and ignored.’²⁰

The bill came into force on 10 April 1710. It is known as the Statute of Anne and is seen as the first piece of copyright legislation in the world. The main provisions of the act were that new books were to be protected for a period of fourteen years; if the author was still alive at the end of this period, he was entitled to a further period of protection of another fourteen years. Books that were currently in print were given a period of protection for 21 years. To be eligible for protection, new books had to be deposited at specified libraries.²¹ The penalties for infringing another’s rights in their copies were financial. The act also contained a price regulation measure that ordained that books should not be sold at a ‘high or unreasonable price’. The term of protection borrowed from the precedent established in patent law. This analogy with patents suggests that copyright was not designed as a property right but as a privilege granted by the state. In order for publishers to claim that it was truly a property right, they would have to explain why literary composition should be seen differently from mechanical invention.²² This has an analogue with the drafting of the Copyright Clause of the American Constitution 75 years later when the coupling of ‘authors and inventors’ also implicated that copyright was a state grant.

The trade had managed to gain statutory recognition of rights in copies, and thus a legal redress against pirates. Moreover, it had managed to avoid a precise definition of what exactly was protected: nowhere does the 1710 act define book, copy or rights in copies. Significantly, the publishers understood the act as running alongside their common law rights in property, which they deemed to be perpetual.

The Statute of Anne marks an important step in copyright’s history but it is not a copyright for the protection of authors. While it is true that an author became a possible owner of the work through the act, he was only one possible owner and it is difficult to see how his position had changed in practice: for a work to be published, the author still required the services of a publisher and would therefore have to relinquish all rights of ownership in the work. There was still no sense of literary property outside of the physical manuscript. So although authors gain their first mention in law in 1710, we should not take it as a reflection of an acceptance of authorial property.

²⁰ Ibid., p.62.

²¹ Oxford, Cambridge, the King’s Library, Sion, St Andrews, Edinburgh, Glasgow, and Kings and Mareschal Colleges, Aberdeen.

The one significant advance for the author in the 1710 act was the renewal term; the second term of protection was only available to authors, not to publishers. This was a benefit to authors but should be understood as an attempt by the legislators to undermine the publishers' monopoly rather than as an affirmation of authorial property. As Patterson states:

Emphasis on the author in the Statute of Anne implying that the statutory copyright was an author's copyright was more a matter of form than substance. The monopolies at which the statute was aimed were too long established to be attacked without some basis for change. The most logical and natural basis for the changes was the author. Although the author had never held copyright, his interest was always promoted by the Stationers as a means to their end... The draftsmen of the Statute of Anne put these arguments to use, and the author was used primarily as a weapon against monopoly.²³

The other important interest group that was mentioned in the title of the act (although their interest is not given such a high priority as in France and the US) was the public. The act was entitled 'an encouragement of learning' and public education was seen to be a more desirous goal of copyright than authorial rights and publishers' profits (though the publishers were willing to promote the idea of public learning to further their ends). Ross has noted that one of the effects of the 1710 act to create the 'public domain' – a body of literature that was owned by the people; 'never before in English history had it been possible to think that the nation's canonical literature might belong to the people.'²⁴

But despite this tip of the hat to public learning, the first copyright statute was a publishers' statute – it only covered works that were published. It was a trade regulation, designed to protect the rights of publishers against pirates while at the same time limiting their monopolies.

Significantly, the act left two questions unanswered that would prove crucial in defining copyright over the course of the eighteenth century. The first of these is that Parliament did not justify the source of the right. It seems to have accepted the general understanding that an author was the first owner of a work. This absolute prepublication

²² Rose, 1993, p.45.

²³ 1968, p.147.

²⁴ 1992, p.2.

right is neither defined nor explained. Secondly, the Statute did not address the question of whether it took precedence over common law rights in copies. In petitions to Parliament during the passage of the bill, the trade made clear that they considered the bill to be confirming an already existing common law right, but this was not picked up on by the legislators. Thus, the two questions that would define copyright over the next century were left unanswered by the first copyright act.

Literary property and the 'battle of the booksellers'

Although under slightly different circumstances, debates concerning the exact nature of literary property, and authors' rights in relation to that property began to flourish in both the UK and France in the mid-eighteenth century. In Britain these debates occurred following the expiration of the rights granted by the Statute of Anne, and in relation to the economic perils of monopoly. In France, they occurred as the Paris Guild sought to re-secure its royal privileges (rather than being driven by authors themselves) and in the context of press freedom prior to the Revolution. In both situations, however, they occurred due to processes by which publishers sought to secure their economic position.

The literary property debate in the UK brought together a wide range of issues, including the metaphysical status of property and the differences between material and immaterial property, as well as the relationship between Scottish and English common law and the relationship between statute and common law more generally.²⁵ Its essence though was the primary question detailed in the introduction: is copyright a state granted positive right or the affirmation of a prior natural right? Those seeking to assert a perpetual copyright that was defensible in the common law argued that it was the latter: although the statutory copyright protection gave publishers a mechanism through which they could enforce their copyrights, it could not take away a natural right, and thus common law protection was available after the expiration of the statutory period of protection. Those against a perpetual copyright (including ideologues who were against commercial monopoly and publishers who made a living by publishing books out of the copyright term) argued that once statutory protection expired, there could be no common law perpetual right.

²⁵ Sherman and Bentley, 1999, p.13.

The fact that this phase of British publishing history is called the ‘battle of the booksellers’ should warn us against understanding the interests of publishers to be homogeneous. There were distinct, conflicting, interests between those publishers who already owned copyrights and sought to maintain them, and those who sought to publish works that had fallen out of copyright. It is notable that in the three most important cases in this battle (*Millar v Taylor* and *Donaldson v Beckett* in the UK, and *Wheaton v Peters* in the US), all of the protagonists were publishers, not authors. This conflict of interests has diminished as the publishing industry capitalised in the nineteenth and twentieth centuries but there is a similarity here with bootlegging, where small individual bootleggers who have not capitalised battle against larger capitals. In general though, in this section when I refer to ‘publishers’ I am referring to those who sought to confirm a perpetual copyright in the assumption that there is a collective interest for publishers in extending the length of copyright protection (even though the institution of an eternal copyright may work against some individual publishers).

The argument put forward by those publishers asserting perpetual copyright relies upon a notion of authorial property founded in natural right and the freedom of alienation by contract. The debate coincided with the development of authorial consciousness (although ‘coincided’ does not do justice to the dialectical interplay of the economic and cultural forms here: it is no coincidence that authors started to become more aware of their intellectual property at this time). I shall discuss the rising authorial consciousness and authors’ interests in copyright in later chapters. Here I shall give a brief overview of the political and judicial battles that the English and French publishers confronted during the literary property debate.

The Paris Guild, like their British counterparts, entered into debates concerning the nature of literary property to protect their monopolies. In 1723 the Crown established the *Code de la Librairie* to regulate the book trade in Paris. This resulted in strong monopolies for the Guild as their privileges were renewed in order that the Crown could keep a close watch on them rather than provincial publishers. Following the succession of the unsympathetic Malesherbes by Sartine to the head of the *Royal Bureau de la Librairie*, the Guild commissioned the rhetorician Diderot to write something in support of the Guild’s ownership of perpetual copy rights.

Diderot wrote a pamphlet defending the property rights of the Guild.²⁶ He did this by stressing the inviolability of authors' rights: 'what form of wealth *could* belong to a man, if not a work of the mind...if not his own thoughts...the most precious part of him, that will never perish, that will immortalize him.'²⁷ Diderot highlighted the special nature of literary creation, arguing against a Lockean labour theory, insisting instead that works are created *sui generis* from the mind.²⁸ While ownership of land is merely a social claim, based on appropriation through labour (and thus open to social mediation), ideas are not appropriated but created from nothing and are thus the most inviolable form of property. As earlier with Defoe, Diderot stressed the specialness of artistic creation. If it could be accepted that the author had a special bond with his work, then who could possibly argue that these special bonds were not everlasting, and that the author could not assign his special rights to another? Coupled with the inviolability of free contract, the inviolability of authorial property was a potent weapon for publishers.²⁹

An opposite position was written by Condorcet in a 1776 pamphlet *Fragments sur la liberté de la presse*. While in England arguments against literary property had been founded in the evils of commercial monopoly, in France (though still concerned with liberalising trade³⁰) it is the public – and particularly the social nature of literary creation – that is posited against authors' natural rights. And as creativity occurs socially, copyright is a socially defined, rather than a natural, right. Condorcet states 'there can be no relationship between the property of ideas and that in a field, which can serve only one man. [Literary property] is not a property derived from the natural order and defended by social force, it is a property founded in society itself. It is not a true right, it is a privilege.'³¹

²⁶ *Lettre historique et politique adressée à un magistrat sur le commerce de la librairie* (1763). It was read by the secretary of the Bureau, Martine, in March 1764. Realising that accepting such an understanding would diminish the Crown's ability to regulate the press, he rejected the argument.

²⁷ Quoted in Hesse, 1991, p.100. For a discussion of copyright and immortality, see chapter 2.

²⁸ For a discussion of Lockean labour theory in relation to intellectual property, see chapter 3.

²⁹ It is a matter of debate how much Diderot was really concerned with authors in this essay. He may have had sympathy with the idea of authors' rights as he was an author himself. However, much of the essay focuses upon the rights of the publishers to maintain an eternal property due to legal contracts. Some writers, such as Birn, state 'to give Diderot his due, however, it appears most likely that when he spoke up in favour of protecting the literary property of publishers, he had the rights of authors primarily in mind' (1970, p.153.). This is severely criticised by Saunders, who states that it is another example of an author-centric teleological approach to copyright (1992, pp.87-88).

³⁰ Hesse (1991, p.102) suggests that the original context for this pamphlet was an attempt to help Turgot, the minister of finance, liberalise trade by suppressing the monopolies of the royal Guilds.

³¹ Quoted in *ibid.*, p.103.

It is interesting that in both countries, it is now authors' rights that are being seen as the source of monopoly. Authors are no longer being seen as opposed to publishers' interests, but as their allies. There are almost two different types of monopoly being challenged here. The first of these is the commercial monopoly, which was particularly challenged in the UK. The monopoly held by the publishers (which, although expired under Anne, was being maintained by publishers claiming common law protection) was seen as a commercial problem, forcing up the price of books and limiting their circulation. As authors were used in defence of this monopoly they become identified as the source of the monopoly. In France, there was a challenge to a 'creative monopoly'. The monopoly enjoyed by authors was seen to be restricting the circulation of ideas. In this relationship, authors are posited against public interest because they appropriate social ideas. This of course was against the Enlightenment; any individual claims to knowledge could only inhibit the social advancement of the Enlightenment.

In England, the date that should have reignited the literary property debate – 1731, when protection for old books under Anne expired – passed without incident. This was because the booksellers treated their copyrights as perpetual under common law. Indeed, they were not reluctant to go to court to protect these 'rights' and there were a number of cases in the Chancery in which injunctions were granted by judges in support of the common law right.³²

Safe in the knowledge that their perpetual rights were sacrosanct, the publishers' biggest concern was imported copies of copyrighted books and they pushed for the introduction of a bill to curtail the number of imports. A bill banning imports was passed in 1739, the last piece of book trade legislation in England in the eighteenth century. The imports that so concerned the trade came from Holland, Ireland and Scotland. However, Scotland was part of the Kingdom and thus bound by the Statute of Anne. This severely curtailed their profitability for, although they exported to America and continental Europe, the real spoils were to be had at home. By the 1740s Scottish booksellers were selling in the North of England and the London trade decided that something needed to be done. This resulted in a series of court cases known as the 'battle of the booksellers' which ultimately determined the issue of perpetual copyright in the UK.

³² Sherman and Bentley, 1999, p.13.

There are two significant cases which defined British copyright law. The first of these was *Millar v. Taylor*. Millar claimed to own the copyright of James Thomson's poem *The Seasons*, of which Taylor had printed an edition in 1766, immediately after the expiration of the 28 year term. Millar filed suit and the case reached the King's Bench in 1769. The case was heard by Lord Mansfield and three other justices, Willes, Aston and Yates. The court found for Millar, in favour of a perpetual common law right, with Yates dissenting. Mansfield's justification of a perpetual right was based upon the author's prepublication right, arguing that there were Chancery cases already decided in support of that right. The source of such a right, however, had not been discussed in the Chancery cases and this fell to Mansfield. He argued that the prepublication right was found in the natural right of authors 'because it is just, that an author should reap the pecuniary profits of his own ingenuity and labour...It is fit that he should choose whose care he will trust the accuracy and correctness of the impression'. The question, then, was whether this natural right was given up on publication, as argued by Yates. Mansfield responded negatively because the author would then be 'no more the master of the use of his own name. He has no control over the correctness of his own work.' The court thus decided for a common law right that existed after publication, and thus in perpetuity.³³

Enter Alexander Donaldson, the most significant of the Scottish booksellers. He had commenced publishing in 1750 with the belief that copyright was a limited term statutory protection only and printed books that were no longer protected. In 1763, Donaldson's response to the London trade's offensive against the Scottish booksellers was to open a shop in London where he undercut London publishers' prices by 30-50%.³⁴ Now that his livelihood was threatened by the decision in *Millar v Taylor*, Donaldson had to act and he did so by reprinting *The Seasons* – the very poem that had been the basis of the case – and selling it in his London bookshop.

Between these two cases, copyright of *The Seasons* had been sold to a group of booksellers, led by Thomas Beckett. Beckett immediately took out an injunction against Donaldson and, unsurprisingly, it was granted by the Chancery. Donaldson had to respond and as the King's Bench had already given its authoritative verdict, he appealed directly to the House of Lords. The case was thus an appeal of *Donaldson v Beckett*, a confirmation of

³³ See Feather, 1994a, pp.87-90; Rose, 1993, pp.78-82.

³⁴ Rose, 1993, p.93.

an earlier case – *Hinton v Donaldson* – which Donaldson had won against perpetual copyright, and a *de facto* appeal of *Millar v Taylor*.

Interest was intense, both inside and outside the House. Spectators had to be turned away and 84 peers voted in the crucial decision (a remarkable number). At this time legal matters in the Lords were voted on by lay peers as well as law lords. In important cases, however, the law peers would give detailed advice on the case beforehand. The advice was neither unequivocal nor unanimous. All agreed that authors had rights, although the breadth of these rights was in doubt. It was agreed (by seven to four) that the 1710 act superseded the common law. However, the majority of the law lords also believed that the common law right of authors survived the term of statutory protection (also by seven to four). The law lords thus advised the House to confirm the decision of *Millar v Taylor*. These opinions were, however, only advisory and it was the decision of the whole House that was determinate. The House had traditionally been hostile to the publishers' attempts to increase their monopoly and they were aware of the financial motives behind the argument for authorial property. One lord stated 'The truth is the Idea of a common Law Right in Perpetuity was not taken up till after the failure [in 1735-1737] in procuring a new Statute for the Enlargement of the Term [of copyright].'³⁵ The Lords voted resoundingly that the 1710 act overrode any common law right and the common law right did not survive the term of statute after publication. It was thus resolved that there was no perpetual common law copyright in the UK grounded in the natural rights of the author.

Copyright in revolutionary France and America

Although the rights of the author were a key feature of debates leading to the clarification of copyright in the UK, it was definitively decided that UK copyright was not grounded in the natural rights of the author but was a positive right subject to conditions and temporally limited. In general, the debate went on without the input of authors: although there was a developing authorial consciousness at this time, it was only in the nineteenth century that authors became heavily involved with claiming their property through copyright. Perhaps if we look toward France and the United States we shall find a system more geared toward authors? France is today regularly upheld as the Western country that

³⁵ Lord de Grey, quoted in Feather, 1994a, p.92.

cares most for authors' rights, embodied in the code of the *droit moral*, the inviolable rights of genius.³⁶ However, while the first copyright statute in France did consider authors more significant than the UK legislation, the most significant interest group in early French law, like the revolutionary copyright across the Atlantic, was the public.

Copyright was the subject of widespread legislation very early on in the history of the US. Given that there was no distinct author-class at the time, nor a throng of publishers baying for protection, it shows a remarkable commitment by the early statesmen to create a new intellectual nation. Early state statutes in the US seemed to be supporting a copyright regime grounded in the natural rights of authors.³⁷ However, by the time the Copyright Clause of the Constitution was drafted, it was the public that were to be the chief beneficiaries of copyright, even more explicitly than in the equivalent French legislation. The Constitution states:

The Congress shall have Power...To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.³⁸

Although it is risky to presume any coherent theory of copyright from the language of the clause (and there was no Congressional debate) 'the dominant idea in the minds of the framers of the Constitution appears to have been the promotion of learning.'³⁹ Indeed, the copyright clause is one of the few constitutional clauses explicitly to state a purpose ('to promote the progress...').⁴⁰

Whether this results in the situation that Lavigne describes – that public benefit is a constitutional requirement of US copyright⁴¹ – is less clear, though it does indicate that copyright was intended for the public benefit rather than as an author's right. Perhaps the

³⁶ The following quote is typical of the modern understanding of French copyright law: 'the most unique feature of contemporary French intellectual property law is the doctrine of moral rights. France stands out not only as the world's leading proponent of moral rights... but also because its doctrine of moral rights predominates over the more traditional economic rights that are typically associated with intellectual property law.' Peeler, 1999, p.423.

³⁷ Patterson, 1968, pp.186-188. Crosskey and Jeffrey, 1953, p.483.

³⁸ US Constitution article I, § 8, cl. 8.

³⁹ Patterson, 1968, p.193.

⁴⁰ Lavigne, 1996, p.319.

⁴¹ Ibid., p.321.

strongest evidence for this is the limitations placed upon Congress by the Framers. Crosskey and Jeffrey point out that it was a favourite device of the Framers to enumerate the powers of Congress in order to express its limitations and the copyright clause is no different.⁴² The key limitation here is ‘limited times’ which places a time restriction on copyright protection – US copyright cannot be perpetual.⁴³ If the constitution was merely affirming a natural right of an author then the limited times provision would have been unnecessary – you cannot put a time limit on a natural right – but the provision points to the conclusion that copyright was a state grant for public benefit. And as it had already been accepted that inventors did not possess any natural right to their inventions, the inclusion of ‘Authors and Inventors’ in the copyright clause would seem to be a deliberate indication that authors also had no natural right in their work.⁴⁴

The one ambiguous element in this reading is the use of the word ‘securing’ as it implies that the Constitution is securing an already existing right. The same issue occurred in the UK in 1709, when the ‘Securing rights’ in the 1709 bill’s title became ‘Vesting rights’ in the title of the 1710 act.⁴⁵ Nonetheless, as Patterson argues that ‘even though they used the word “secure,” if the framers intended to empower Congress to grant authors a natural-law right, they acted inconsistently.’⁴⁶ And as the creation of a new state granted right rather than the affirmation of an existing natural right is certainly how Congress, when creating the federal copyright act of 1790, understood the copyright clause.

It had become obvious that attempting to create uniform copyright legislation through the various state laws was impossible and so Congress introduced its own copyright bill. There can be no mistaking the conception of copyright created by the act – copyright is a state grant and not a natural right. The act was based upon the Statute of Anne and offered copyright to authors or publishers for fourteen years, with a possibility of a fourteen year renewal term available to any author still alive at the expiration of the first term. Copyright required deposit of the book within six months of publication and a note of copyright to be published in a newspaper for four weeks. These prerequisites offer evidence against a natural rights approach.

⁴² 1953, p.486.

⁴³ There could also be a limitation by the word ‘writings’, but as the definition of a writing has expanded to the point where a live rock performance can be considered a writing, it appears to have not been a bar to Congress’ extensions of copyright.

⁴⁴ Ibid., p.486.

⁴⁵ Rose, 1993, p.46.

⁴⁶ 1993, p.8.

It is section five of the act that offers the strongest evidence against a natural rights interpretation of American copyright, however, for here it stated that copyright protection was only available to US citizens. The fact that copyright was geographically limited graphically illustrates that it was not viewed as a natural right, for natural rights cannot be limited to home citizens. And, despite the intention of this clause being to nurture a fledgling American publishing industry, it also points to the reasons why we can understand this act to be wholly concerned with the public interest, rather than the author or the publisher. The American publishing industry was quickly developing (and responding to) a growing literary mass market. Although America's population was smaller than that of the UK, it had a much larger reading population with 90% literacy for American whites. Thus the American publishing industry was much larger than its British equivalent, selling approximately four times as many books for about a quarter of the UK price.⁴⁷ This growth was predicated upon the reprinting of books published in England but not protected by American copyright.⁴⁸ Congress did not want to deter the expansion of the industry and so did not protect foreign authors, leaving a mass of unprotected works for American publishers to publish. Because of this, copyright was unimportant to the profitability of the publishers and, unlike British and French publishers at the time, they showed little interest in copyright. With no organised interest group prepared to lobby government for its own narrow interests, this left the path clear for the 1790 act to focus wholly on the public good.

These two facts (copyright being intended for public education, and copyright not being necessary for profitability) can be illustrated by the number and types of copyright registered in the years after 1790. Nearly all early registered copyrights were educational.⁴⁹ 1790-1792 saw 441 works of political science and history registered, but only 41 novels (and this included three editions of *Robinson Crusoe*).⁵⁰ However, in the context of the 13,000 or so works published in the US at this time, we can see that copyright was not a major issue for American publishers.⁵¹

⁴⁷ Saunders, 1992, p.156.

⁴⁸ Although English authors were upset by this situation (see Joseph, 1994), it was possible for them to make some money from American publishers by promising them an early copy of the finished draft as there was great competition for lead time between US publishers.

⁴⁹ Ginsburg, 1990, p.1002.

⁵⁰ Saunders, 1992, p.154.

⁵¹ There was also no copyright trial prior to 1791, and only two between 1791 and 1834 when the third copyright trial was the landmark *Wheaton v Peters*, America's equivalent to *Donaldson v Beckett*. (Ginsburg, 1990, p.1005.)

These factors make it clear that, more than in the UK and France, the ‘copyright provided for [in the US] was wholly statutory, without any reliance upon the natural rights of the author’⁵² and ‘the central focus of American copyright philosophy is the public benefit from the production and dissemination of these works, rather than the private rights of the author.’⁵³

The one place where it is acceded that the author does have a natural right in the 1790 act is described in section six, where the author is given an absolute interest in unpublished works. This right was against unauthorised publication and would therefore be protected in the common law.⁵⁴ However, once the author decided to publish his work, he entered into a contract with the public whereby he gave up her absolute rights to the work and gained limited statutory protection instead (enough to gain some financial, and possibly status reward). This was consistent with the *Donaldson v Beckett* decision. Copyright was thus not a reward for *creation*, but a reward for *dissemination* through publication.

The debates concerning the nature of literary property during the French Revolution occurred in circumstances dominated by the idea of the freedom of the press and without the influence of the Paris Guild, which was formally abolished in March 1791.⁵⁵ France’s major law on intellectual property was instigated in 1793. Before that, however, there was a significant piece of legislation in 1791 which altered the perceived character of authors. Up to this point, authors’ rights had been tainted by an association with corporate interests – not particularly popular in revolutionary France. A complaint by playwrights over the monopoly enjoyed by the *Comédie Française* changed this. Their complaint was that only theatre directors could legally gain privileges to present and publish dramatic works. A petition to the Assembly late in 1790 requesting a limited, rather than an eternal, right to enable playwrights to put on their own plays, was acted on by January 1791. The request, and the final act, positioned authors as public servants rather than publishers’ lackeys.⁵⁶ Authors became understood as labouring for others’ entertainment and education rather than for

⁵² Patterson, 1968, p.200.

⁵³ Abrams, 1983, pp.1185-1186.

⁵⁴ Saunders, 1992, p.152.

⁵⁵ Hesse, 1991, pp.108-114.

⁵⁶ Ginsburg (1990, p.1006) argues that the decree of 1791 was intended mainly for the public benefit, pointing out the first article of the decree is that any member of the public could open a theatre and that only the third article refers to authors but this seems a little strained and an example of post-structuralist attempts to exaggerate the relative unimportance of authorship.

private profit. This assisted a change in attitude towards authorship. Authors were transferred from the side of the corporations to that of the people, and jurisdiction for literary property passed from the department of agriculture and commerce to the department of public instruction, headed by Condorcet. Another significant event prior to 1793 was the introduction of a separate bill on libel and censorship. Literary property could now be debated separately from those issues, and only in terms of public education.

The ‘Declaration of the Rights of Genius’ was issued on 19 July 1793 and is considered the first French copyright act. Copyright was granted for the life of the author plus ten years. Any privileges still in existence from the old regime were abolished and replaced by the *Bibliothèque Nationale*. This action immediately freed both classical literature and the great works of the Enlightenment into the public domain. Any author who sought copyright protection for a book had to deposit two copies at the *Bibliothèque*. This would ensure public access to all new books and maintains the spirit of Condorcet’s original argument.

Ginsburg points out many similarities between French revolutionary copyright law and the first US copyright act of 1790 (which was available in French translation to the legislators of 1793). The most important is the prominence of the public interest as the guiding principle of copyright. This is reflected by the need for the deposit of a work to qualify for protection under both regimes. By necessitating conditions for copyright protection, the French and American governments recognised that a work was only in the public’s interest if they were able both to discover that a book had been published and get their hands on a copy at the national library. There were also similarities between the types of work – primarily educative – that were registered for early copyright in both countries.⁵⁷ In both countries it is clear that copyright is a state grant, one French commentator lamenting ‘nothing has changed in ideas, nor in legislation: the word *property*, it is true, has replaced that of *privilege*, but this property is still but a charitable grant from society.’⁵⁸

There are differences between the copyrights of revolutionary France and America, however. Though intended for the public benefit, the law in France also felt the pull of authors’ rights more significantly than either America or the UK. The law drew from some of Diderot’s ideas about the natural rights of authors - the title of the act mimicking the

⁵⁷ Ibid., p.1015.

⁵⁸ Edouard Lamboulaye, *Études Sur la propriété Littéraire en France et en Angleterre* (1858) quoted in *ibid.*, p.1011.

Declaration of the Rights of Man - but did not reach the same conclusions. Whatever rights the author may have are made subservient to the public right. This certainly reflects the Enlightenment position enunciated by Condorcet a decade earlier; any individual claims to knowledge will impede social learning as a whole. But the positioning of the author as the facilitator of public enlightenment places him in an elevated position. We can see in the copyright acts of the French Revolution, the germs of an understanding of authorship that leads to the strong authorial protection of the moral rights doctrine in the next two centuries. The dialectical tug of the two interests can be seen in the length of copyright protection offered in France; the life of the author plus ten years. This was the only country to offer a *post mortem* protection, indicating strong authorial rights, yet it also ensured that the great works of French literature immediately entered into the public domain. The creation of the public domain was a more conscious step than its UK equivalent: Rousseau, Voltaire, Moliere and Racine had all been dead for more than ten years.

No such elevation of authorship seems to have developed during the American revolution. The American understanding of copyright was affirmed in *Wheaton v Peters* in 1834.⁵⁹ Wheaton was a reporter for the US supreme court, a position that traditionally rewarded the incumbent through the selling of their reports. He was succeeded by Peters in 1828 who, despite requests from two previous reporters and their publishers, announced his intention to publish all of the cases of the supreme court in six volumes. When Peters published his third volume in 1833 – the first to contain cases on which Wheaton had reported – Wheaton served an injunction stating that they were under his copyright. Peters response was that the statutory requisites had not been followed in order to obtain copyright: the reports were thus not protected by statutory copyright and there was no common law copyright in the US.⁶⁰ The central question was thus the same as that in *Donaldson v Beckett*: is there a perpetual common law copyright that exists apart from the statutory protection? If the answer is yes, then Wheaton's failure to register his copyright only invalidated his statutory protection, it did not impinge his common law natural right. The circuit court of Pennsylvania rejected Wheaton's argument and Wheaton appealed to the supreme court. The supreme court held that the fulfilment of requirements was necessary to obtain copyright protection and that there was no alternative source of copyright protection

⁵⁹ 8 Pet. (U.S.) 591 (1834)

in the US (i.e. no common law copyright). The case was sent back to the circuit court to decide whether the Wheaton had adhered to the mandatory requirements, but the battle was over, both in terms of the case (Wheaton had not abided by all requirements) and in terms of US copyright.⁶¹ US copyright was also definitively defined as a positive, not a natural right.

In 1909, a new US Copyright Act introduced a concept into American copyright that reaffirmed the lowly position of the author (though it also reflected the increasing power and importance of the American publishing and entertainment industries). This was the ‘Work Made for Hire’ principle. Under this regulation, copyright in any work that was created by an employee during the course of employment, or in a work that had been specially commissioned, vested in the employer or the person who had commissioned the work.⁶² The creator has no rights in the work whatsoever. This was clarified in the 1976 act but the principle remained the same – the artist does not have any rights in the work as this would hinder its commercial exploitation.⁶³ This is despite the fact that the author took on a more important role in American copyright in the 1976 act, something that will be discussed in the chapter 3.

Developing a framework to understand copyright

In this section, I wish to put forward some early conclusions concerning the nature of copyright and the main hypothesis that shall be tested in this thesis. It is intended that the model of copyright put forward here shall be used in the rest of thesis as the theoretical

⁶⁰ He also argued that the material was not entitled to copyright protection anyway.

⁶¹ See Patterson, 1968, pp.203-210.

⁶² The UK also has an equivalent provision in its own copyright legislation. In American legislation, the employer becomes known as the ‘author’ of the work. In UK law, the creator is still referred to as the ‘author’ but copyright is owned by the employer. The relevant sections of law are: 17 U.S.C.A. § 201(‘(b) Works Made for Hire.--In the case of a work made for hire, the employer or other person for whom the work was prepared is considered the author for purposes of this title, and, unless the parties have expressly agreed otherwise in a written instrument signed by them, owns all of the rights comprised in the copyright.’); and 1988 UK St C48 pt 1 c1 s10 (‘(2) Where a literary, dramatic, musical or artistic work is made by an employee in the course of his employment, his employer is the first owner of any copyright in the work subject to any agreement to the contrary.’)

⁶³ This has been slightly modified by the introduction of moral rights for fine artists in American law through the Visual Artists’ Rights Act in 1990, although the words of Senator Hatch are reflective of US copyright: ‘zeal for authors’ rights must always be tempered by the practicalities of commercial exploitation of copyrighted works.’ (1998, p.757.)

framework in which I shall discuss developments in copyright and the case study of bootleg records.

The first lesson that the history of copyright teaches us is that copyright should not be considered as something that protects the natural rights of authors. In all of the countries discussed here, it was decided that copyright was not primarily intended for the protection of authors. We must therefore try and escape from an understanding of copyright that places authors at the centre of its universe, something judges and legislators have often failed to do.

My argument is that copyright exists as a relationship of three interests – those of the author, the public and the publisher.⁶⁴ The author has an interest in being free to create, and being able to communicate her work to the public. The public has an interest in being able to freely access the works that have been published. And the publisher has an interest in making a profit. It is the *relationship between* these three interests that is the social phenomenon of copyright.

These three rights are thought to be compatible and copyright is understood to exist as a mechanism to ensure a harmony of these interests. It appears as though all three interests are served through the moment of publication. Publication enables the author to communicate his work and to make enough money to survive. It enables the publisher to make a profit and ensures that a new work is available to the public. It also (in theory) increases the amount of ideas flowing through society, providing impetus for further creativity. If copyright is to achieve its stated aim of improving public access to creative works, therefore, it must ensure the publication of works.

The three rights are mutually constitutive. None of the rights could exist without the existence of the other two. In particular, it is the existence of the publisher that facilitates the relationship between author and public, as it is the publisher that facilitates publication. The situation in post-Revolutionary France illustrates the interdependence of the three parties' interests: when royal privileges were discarded there was no protection for publishers

⁶⁴ In this section, 'Publisher' is a generic term referring to any enterprise or individual that explicitly facilitates the publication of an author's work. A record company would therefore be considered a publisher. Similarly, 'author' is also a generic term, referring to anyone who creates a work for publication. My definition of 'public' is taken from a conventional understanding in copyright that the public are the users of published works. In a later chapter I argue that we need to understand the public as a body that is part of the creative process, and thus we need to consider the public as users and creators. From this understanding, it is important to recognise that current copyright places authors against authors, as those authors who seek to use previous works in their own creations are challenged by copyright holding authors. It is thus important to recognise that authors also form part of the public and thus have some shared interests with the public.

against 'pirate' editions. In this situation, publishers would not risk publishing expensive books as they could be easily copied by competitors and they thus concentrated on printing cheaply produced pamphlets. Thus because the publishers' interest was inadequately protected, the interests of both authors and the public became compromised.

This mutual constitution is a reflection of the fact that an artistic work cannot be created outside of the social relations of production that constitute its social context. It is not possible for a work to be created in a vacuum. 'Authored work was always understood to be already circulating in the market.'⁶⁵ Marketisation (and thus entry into the sphere of copyright protection) is not something that happens to a pre-existing work, it is the very condition of its production.⁶⁶ It is not possible to conceptualise a piece of popular music outside of its economic and technical relations. We should not, therefore, try to understand creativity outside of its market context or of authors as pre-financial beings. This market context includes copyright, as intellectual property rights form the most significant feature of competition between producers in the entertainment industries.⁶⁷

Because the market is the context of all cultural production, copyright is a category that regulates commodities. 'Copyright' presupposes the ability to copy, to reproduce a work; it is a phenomenon borne out of mechanical reproduction. As such, it is concerned with the economic distribution of reproducible cultural goods and is thus a trade regulation. This is how copyright was first conceived in the UK.⁶⁸ Politicians may have political goals of increasing public enlightenment or protecting authors, but both of these goals are achieved through the regulation of the publishing industry. It is thus publishers and not authors or the public that are the central interest group in copyright. Indeed, copyright was initially available only for those works that were published, so copyright could not occur were it not for the publisher. Publishers are the fulcrum of copyright as they are involved in the only two direct market relationships in copyright: the publishing deal between artist and publisher, and the sale between publisher and public.⁶⁹

⁶⁵ Nesbitt, 1987, p.235.

⁶⁶ This is a point Frith has made regarding popular music. (Simon Frith, 1987, 'The industrialisation of popular music' in J. Lull (ed.), Popular Music and Communication, Sage, Newbury Park.)

⁶⁷ Frith, 1987, p.59.

⁶⁸ Since the introduction of the Trade Related aspects of Intellectual Property (TRIPs) agreement in 1993, copyright is beginning to be viewed (certainly by governments) as a trade regulation once more.

⁶⁹ It is worth noting that copyright was initially intended as protection against *piracy*. It is only in its more recent history, through the elevation of the author, that copyright has come to be used against *plagiarism*, a point I shall discuss in chapter 6.

We must therefore understand copyright as a mechanism through which governments attempt to facilitate the publication of creative works by providing publishers with sufficient protection for them to gain a profit on their publications. Copyright is an incentive for publishers to publish. It is thus a trade regulation, it is not a property right. The significance of the *Donaldson* and *Wheaton* decisions is that it was definitively confirmed that copyright is a state granted right and not a property right. This is important to remember because those who seek to establish a perpetual right in intellectual property still feign that it is a property right like any other.⁷⁰ The first principle of a property right, however, is the right to exclude, and this is contradictory to copyright's stated goal of public access. In 1866, in an attempt to circumvent this problem, French legislators removed any reference to property from their copyright law. A government spokeswoman said of the bill

We have been faithful to the principle informing our past laws. . . . The Bill does not refer to "property" but it could have done so. The Laws of 1793 and 1810 which do refer to "property" use the word in relation to a right that they designed to be temporary, and because in literary matters "property" means "temporary", it would have been no great risk to include it in the title of the present Bill. However, we chose not to do so. Why? The reason is that the word "property", once quite inoffensive, has in recent times been considerably abused. It is because from "property" has emerged, fully armed, the theory under whose influence many people believed themselves to be invincible logicians in declaring: since it is a property, let us treat it like any other property.⁷¹

The removal of the term property from French copyright legislation facilitated the rise of the 'dualist' conception of moral rights, whereby an author's creative interests in the work are kept distinct from the financial interests, as discussed in the next chapter. The creative interests are perpetual but inalienable and so they cannot be used by publishers in the same

⁷⁰ Cf. Senator Hatch, 1998, p.721. 'The first principle of a contemporary copyright philosophy should be that copyright is a property right that ought to be respected as any other property right.'

⁷¹ Quoted in Saunders, 1992, p.96.

way that the alienable (and temporally limited) financial interests can be.⁷² And the strong moral rights in France have sometimes proved to be a hindrance to commercial exploitation of works, such as filmmakers preventing their films being either colourised or edited to fit in with television schedule requirements.⁷³

The dualist conception of moral rights indicates the ambiguous position of the author in copyright. The author, rather than being the central origin of copyright, is really only a subsidiary category. As the role of ‘the author’ contains a combination of an individual’s aesthetic and financial interests, the author is an uneasy ally with both the public and publishers. Patterson argues that the conflation of the author’s economic and creative interests is the result of publishers’ tactics of relying on the natural rights of the author during the literary property debate. Thus the author’s creative interest in the work came to be seen as the cause of the economic monopoly in publishing. The result, according to Patterson, is an Anglo-American copyright that does not recognise the author’s creative interest in the work, a situation much less favourable than the French dualist position.⁷⁴ Patterson is correct in saying that there is a conflation of creative and financial interests in Anglo-American copyright but his unproblematic assumption of the Romantic author having an absolute right to his work leads him to the wrong conclusion: enabling an author’s monopoly in the creative interest seriously undermines the public interest in copyright as I will explain in chapter 4.

However, Patterson’s argument does lead me to the main hypothesis in this thesis, on which I shall elaborate in the following chapters: the history of copyright is one of an uninterrupted expansion of the rights of capital at the expense of primarily the public, but also authors.⁷⁵ Copyright has increased from an initial fourteen or twenty-eight year period of protection, to its current level of the life of the author plus seventy years, a period of

⁷² This is in contrast to countries that favour a ‘monist’ conception of moral rights (i.e. that moral and financial rights cannot be so easily separated and moral rights are therefore alienable), such as Canada. Fraser, 1996, p.295.

⁷³ See Paul Geller, (1992), ‘French high court remands Huston colorization case’, *Journal of the Copyright Society of the USA* 39, pp.252-258.

⁷⁴ Patterson, 1966.

⁷⁵ I say capital rather than publishers here because the use of the Romantic author can work for or against individual publishers. However, my suggestion is that it is the capitalisation of the publishing industry in the nineteenth and twentieth centuries that allowed the full realisation the functions of the Romantic author for copyright purposes. Feather states that the transformation of booksellers into publishers began to emerge out of the Donaldson decision: ‘Out of the trade debris of Donaldson v Beckett, two modern groups began to emerge; publishers and professional authors.’ Feather, 1994a, p.94.

protection approximate to a century.⁷⁶ This does not occur explicitly, however, but through the vehicle of authors' rights. Despite historical differences between the countries studied here, there is a discernible trend in all cases for the concept of authors' rights to take on increasing prominence within the rhetoric of copyright. I shall elaborate on the problems of this in chapter 4. The elevation of authors' rights, however, has not necessarily resulted in an improved situation for authors. As authors still require publishers to achieve dissemination of the work, authors' rights often serve as little more than a stalking horse for publishers' interests. The dual character of the US 1976 Copyright Act – increasing the prominence of the author in copyright while simultaneously strengthening the work for hire provisions of American law – is perhaps the best example of the interests of capital being served by elevating the importance of the author and I shall discuss it in chapter 3. This was also the case in the literary property debate in the late eighteenth century and in the passage of the Copyright Extension Act in the US in 1997.

I do not wish to propose a wholly manipulative relationship between capital and authorship. Publishers do not (always) sit around calculating how they can best manipulate authorship to strengthen their interests. The relationship is far more complex than mere instrumentalism, and conceptions of authorship sometimes work against the interests of capital. The vigour with which elements of the trade fought against perpetual copyright in the late 1830s should warn against any simplistic instrumentalism. But there is a general trend in copyright that involves a strengthening of publishers' interests through the veneer of authors' rights. The reason that this became possible is the development of the body of beliefs about art that we now characterise as Romanticism. The development of Romanticism was, no doubt, also a reflection of developing literary property debates – there is no simple causal relationship between Romanticism and intellectual property law. Indeed the law has played its own part in the development of Romanticism.⁷⁷ Nonetheless, without that body of Romantic beliefs to act as a conceptual background for the development of copyright, copyright would have expanded in a markedly different way.

⁷⁶ Works made for hire in the US are now protected for 95 years.

⁷⁷ Sherman and Bentley, 1999, pp.57-59.

Chapter 2

The rise of the Romantic author in copyright

*Everybody knows that you live forever
When you done a line or two¹*

Given that none of the three copyright regimes that we have discussed here initially had the benefit of the author as their *raison d'être*, we may wonder at what point the author begins to take position at the head of copyright. There are two related processes that occur. The first is an *elevation* of the idea of authorship. The second process, concurrent with the first, is the *centralisation* of the author within copyright rhetoric and practice. By centralisation, I refer to the process by which authors, rather than publishers as previously, come to be seen as the fulcrum of copyright. By centralising authors within copyright, it is easy for their interests and rights to become predominant, in rhetoric at least if not in practice. Both of these processes had already begun by the eighteenth century, but it is in the nineteenth that they come to full realisation. The concurrent processes that strengthened the idea of the author in copyright emerge out of the Romantic period. In this chapter I shall look at these two processes and detail the social environment that gave birth to these ideas. In particular, I shall look at Wordsworth's role in the 1842 UK Copyright Act and discuss some of the reasons that Wordsworth was so obsessed with copyright as they are fruitful for understanding the relationship between Romanticism and copyright more generally. Wordsworth's understanding of copyright and authorship are sophisticated and do not reflect what has become commonly understood as Romanticism. In the last section of this chapter, I will discuss how Romantic conceptions of creativity became simplified. I shall look at Bohemianism in nineteenth century Paris, which occurred concurrently with the development of the *droit moral* (accepted today as the strongest form of rights available to modern authors) before offering some tentative reasons why the hegemonising of such a conception may have occurred.²

¹ Leonard Cohen, 'Everybody Knows' (from the album *I'm Your Man*), 1988.

The Romantic author in UK copyright

In UK law, the centralising of the author occurred by accident. As part of the 1662 licensing act, there had been a requirement that a copy of each new book be deposited at Oxford and Cambridge. This had expanded to twelve institutions by 1710.³ Libraries made some effort to enforce their rights but the trade was distinctly uncooperative and a Cambridge fellow, Edward Christian, petitioned against the lack of deposits. A bill was introduced that would increase the copyright term to 28 years and stress the requirement of deposit. The trade organised against the bill, however, and it was lost. Christian would not desist, however, and in 1811 persuaded the university to bring a case against a publisher for failing to deposit a new book. The court found unanimously in the university's favour. The trade petitioned parliament to introduce a bill nullifying the result, pleading exemptions for books in small print runs and expensive books. After a tortuous passage, the bill was lost.

However, in the following year, a bill passed with no concessions to the trade. The bill proposed that copyright was to be extended to 28 years and eleven deposit copies were required within six months of publication. Changes during the committee stage, however, resulted in an unsatisfactory bill being sent to the Upper House. Among the minor detail, the Lords made one crucial amendment: copyright was to be 28 years, or the author's lifetime. The bill gained royal assent in July 1814 and for the first time in the UK, copyright was associated with the lifespan of the author. No discussion appears to have taken place on the issue, so it is impossible to understand the rationale behind the move.⁴ But the author had moved to the centre of UK copyright, a position it would solidify in the next thirty years, spurred on by one of the most famous Romantics.

In 1837, a new copyright bill proposing *post mortem* protection was brought forward by Thomas Noon Talfourd; MP for Reading, judge, minor author and self-confessed 'friend to the authors'. The bill he introduced was extremely radical: copyright was to be for the

² The centralisation of the author in US law happened much later than the UK and France, indicating that there is no causal relationship between elevation and centralisation. I shall discuss the American situation in chapter 3.

³ King's and Trinity in Dublin were added in 1801.

⁴ An author's *post-mortem* term of protection had been proposed by Parliament in a book trade bill in 1737 in order to take advantage of the positive perspective on authors at the time and weaken the strength of the booksellers. The booksellers had managed to have the bill killed, however. France by this time already had a term of protection dependent upon the author's lifetime and so this may have had an impact upon British understanding.

author's life plus sixty years, and existing books in copyright would revert to the author after 28 years.

Feather suggests that Wordsworth was the likely inspiration for the 1837 bill.⁵ Wordsworth had always maintained an interest in copyright and had been extremely agitated by the decision in *Donaldson v Beckett* to repeal perpetual copyright.⁶ He grew increasingly concerned with finances and copyright throughout 1836 and towards the end of the year had written to his publisher, Edward Moxon, stating his anxiety over the commercial world. Forty years after the publication of the *Lyrical Ballads*, Wordsworth's income from his books was just £200 a year. Wordsworth's preoccupying concern was provision for his family and he was refusing to publish his major work, the *Prelude*, until after his death because a posthumous publication would guarantee a greater income for his family. It was this position – providing for the author's family – that Talfourd took up in his speech introducing the 1837 bill. The bill easily passed through its first and second readings but was lost when Parliament was dissolved due to the death of the King. Talfourd was later to claim that it was only this divine intervention that led to his bill failing to become law, but this is not so certain. If the bill was uncontroversial, it could easily have been rushed through before the dissolution of Parliament. Instead it was deferred for three months at its second reading, making the bill as defunct as the king, already dead a week.

In fact the trade had already begun to stir against Talfourd, uniting around Thomas Tegg. Tegg was a publisher who specialised in printing out-of-copyright books and reprinted abridgements, still a grey area in copyright law. Talfourd's proposal would undoubtedly ruin his business and he vociferously co-ordinated the opposition. In early summer Tegg issued a pamphlet arguing for 'public benefit not private reward.' His substantive points were that an author's monopoly would raise prices and that authors already got a fair deal.⁷ Tegg knew his market well and argued that Wordsworth and Talfourd were only working for an enlightened few.⁸ People like himself, who published for the great mass of people, would suffer. Moreover, he argued that the already existing legislation seemed to hinder neither the creativity of authors nor the publication of new books and Talfourd had been backed by

⁵ 1994a, p.125.

⁶ Ross, 1992, p.17.

⁷ Zall, 1955, p.134.

⁸ Wordsworth would have agreed with this – he understood that cheap editions of popular works were making enough money, but he felt that 'good books' (i.e. his) which may have a steady but small demand were not given a long enough period of protection.

no libraries or book societies. The matter was closed for 1837 and, in the next parliamentary year Talfourd, who by now realised the strength of the opposition, had prepared more thoroughly.

The bill was reintroduced in 1838 and passed its first reading. The second reading was set for 11 April. Long before that, however, things had deteriorated for Talfourd. The Association of Master Printers met on 5 April to co-ordinate the trade's opposition and petitions poured in from printers all over the country. Of greater concern for Talfourd were the views of members inside the house. The 1838 debate was divided upon party political lines more than the previous year. On 21 March 1838, Talfourd had written to Wordsworth stating 'the Booksellers threaten me with a very strong opposition – and the Doctrinaire [utilitarian] party are inclined to support them.' This brought Wordsworth out of his complacency.⁹ He wrote to Gladstone, and sent a rather tetchy letter to Peel stating that '...if the bill does not pass...I shall be aggrieved in the most tender points.' The bill had few influential supporters, however, and no one apart from Talfourd had the passion of its opposition. Gladstone was the bill's most prominent supporter. Disraeli also supported it but he had yet to rise to prominence. Peel was a lukewarm supporter but was lost to the cause because of a political rivalry with one of the bill's most prominent sponsors, Robert Inglis. Strangely, Wordsworth passed over the most obvious course of action – to petition Parliament himself. This was both for reasons of personal distaste and politics; he did not want the bill to appear as one for his own personal gain. He did make his views public though, in an anonymous letter to the *Kendal Mercury*, responding point by point to a petition by the publishers. In it he argues that the current law suits only those writers whose work is 'intended only for the season' whereas works written for future generations, such as his, cause financial hardship to those writers and their families.¹⁰

The second reading could have been worse for Talfourd and Wordsworth. Talfourd, never a great orator, gave one of his best speeches on the subject. The greatest opposition did come from the Doctrinaire party, on this occasion led by Joseph Hume, who argued that authors were already well rewarded. Hume was contemptuous of Wordsworth, calling him indolent and referring to his secondary job as Distributor of Stamps – the poet as tax collector. The main economic argument concerned the legitimacy of the monopoly

⁹ A month earlier had written to Moxon asking 'Have you any reason for believing that Sergeant Talfourd's motion will meet with any opposition in the House – at all formidable'? Quoted in Feather, 1994a, p.152.

apparently conferred by copyright. The Attorney-General opposed the bill because copyright was a commercial monopoly and the bill merely transferred this from printers to authors. The bill barely passed its second reading. Only 71 members voted – indicative of the general lack of interest in the bill. The second reading was granted by 39:34 [sic] with the motion to pass it to committee granted 38:31.¹¹ It was a victory, but a hollow one.

At a time when he was an aged man too ill to travel to London, and when he is commonly believed to have lost all of his youthful political activism, Wordsworth was now spurred into a campaign of astonishing magnitude. He wrote upwards of fifty letters in two or three days to members of parliament, encouraging them both to attend the second reading and persuading them of the justice of the bill. On 23 May, he wrote a sonnet *A Poet to his Grandchild; Sequel to 'A Plea for Authors'*, condemning parliamentary apathy on the situation.¹²

The bill eventually reached the committee stage, but only after a further division (an encouraging 116:64¹³). The leading opposition in the committee came from Thomas Wakley. For Wakley, the second reading had indicated no genuine approval of the bill, and would interfere with the circulation of books and property rights. Henry Warburton, another Radical, stated that there was no evidence that authors would be better off than under the current 1814 act and that if it went to committee he would oppose and question every clause. The proceedings were reported to the House, which agreed to reconvene but on 15 May, the committee was deferred. On 20 June, Gladstone suggested to Talfourd the postponement of the bill until the following year and Talfourd bowed to the inevitable. The bill had been defeated by the procedural wiles of its opposition.

Talfourd returned with his bill the following year and it was given an unopposed first reading. This time, Wordsworth had agreed to write a petition to parliament in support of the bill. The first draft was considered too egotistical, it being commented that Wordsworth 'is desirous to express his own impressions and cares too little about the impression it will excite in others.'¹⁴ Wordsworth also persuaded Robert Southey, who shared concerns over copyright, to petition the house. A general petition was organised by

¹⁰ *Letter to the editor of the Kendal Mercury*, in *Prose* 3:309-312.

¹¹ Feather, 1989, p.52.

¹² *A Plea to Authors* was also a sonnet on this issue, written some time earlier in the year and sent in a letter to Robert Peel in an attempt to secure his wavering support.

¹³ Feather, 1989, p.53.

¹⁴ Henry Crabb Robinson, who organised the authors' petition, quoted in *ibid.*, p.54.

Robinson which was signed by a number of authors. However, many authors would not sign, some because they were sending their own petitions but many out of indifference. It should not be assumed that there suddenly appeared a uniform authorial consciousness. Wordsworth's petition was typical, both of his own views and of the other petitions sent in, arguing that most of his copyrights would be in the public domain by the time of his death, and that he wanted to protect the interests of his family and heirs.

Far less passion was aroused than the previous year, partly because the trade thought that there was enough political opposition to the bill for them not to have to bother. The nature of the House of Commons was changing, becoming split on the basis of more or less cohesive political philosophies. Thus a small number of united MPs could use parliamentary procedure to stop a bill. This is what happened in 1839, and again it was the radical free traders who were the obstruction.

The committee stage had been set for 10 April but the house was inquorate with only 28 members present. This was a humiliation. Wordsworth wrote to Talfourd that he was 'mortified...you should have had so much trouble and made such a sacrifice, to meet so unworthy a House of Commons.'¹⁵ The committee was rearranged for 1 May, and a number of authors, stirred into action, sent in petitions for that day, including Dickens and Carlyle, who wrote 'forbid all Thomas Teggs and other extraneous persons...to steal from him [the author] his small winnings, for a space of sixty years at shortest. After sixty years, unless your Honourable House provide otherwise, they may begin to steal.'¹⁶

The motion to commit the bill was not passed until late in the evening. Warburton, proposed to defer the motion (defeated 127:24). He then, seconded by Wakley, proposed an adjournment (defeated 132:9). A further motion to defer the committee stage by Warburton was lost 119:7, and a second adjournment motion failed by 91:9. Warburton had succeeded in wasting several hours of House time, ensuring that enough members had gone home to raise concerns of inquoracy. When they turned to the substantive business of the bill, there were fourteen divisions on various motions, amendments and adjournments.¹⁷ By the time the committee was adjourned at dawn, it had dealt with only four of more than twenty

¹⁵ in de Selincourt, 1939, pp.969-970.

¹⁶ Quoted in Feather, 1994a, p.140.

¹⁷ All passed but some were close; the 60 year *post mortem* term being approved by a majority of only twelve.

clauses. The committee stage was deferred a further twelve occasions until, on 8 July, it was deferred for three months and was dead once more.¹⁸

1838 and 1839 represented Talfourd's best chances of success and he had met with total failure. It is difficult to see what more he could have done, after mobilising the literary corps. Wordsworth, though maintaining an interest in the subject, was abject and never so involved again. In 1840 Talfourd brought the bill forward again but it never reached the committee stage and in 1841 it failed to even make a second reading. 1841 proved to be Talfourd's parliamentary swansong. He had been a poor politician who had recognised the changing nature of the house too late. He was not a good orator and a poor tactician. The Whig government fell on a vote of confidence in 1841 and Talfourd lost his seat in the subsequent general election, never making his name as the literary politician he desired.

Two supporters of the bill who were safely returned in the election were Gladstone and Lord Mahon, who now sat on the government benches and were in a stronger position than Talfourd had ever been. Mahon took on the copyright initiative and compromise was in the air – the bill sought a 25 year post mortem term. Wakley and MacCauley both suggested that they may be willing to compromise. MacCauley said that he had never opposed a *post mortem* term in principle and proposed seven years, or 42 years if the author died within seven years of publication. These were carried and the rest of the procedure was passed easily.

The UK copyright acts of 1814 and 1842 fundamentally changed the nature of British copyright. The 1842 act offered protection of the author's life plus seven years, unless the author died within seven years of publication, in which case it was 42 years. If the author assigned the copyright to another, it only enjoyed a protected term of life plus seven years unless it was assigned to the author's family, when they received full protection. The term of protection was increased to the life of the author plus fifty years in 1911, in keeping with the Berne Convention.¹⁹

The 1842 act placed UK copyright law at the service of art rather than education. UK copyright law was no longer an 'act for the encouragement of learning', it was now an 'act to afford greater encouragement to the production of literary works of lasting benefit to the world.' The author had moved to the centre of copyright by becoming the basis of the

¹⁸ Feather, 1989, p.57.

¹⁹ Bainbridge, 1999, p.34.

term of protection, and the paternal relationship between author and work was supported by *post mortem* term of protection.

Romanticism and copyright

The 1842 copyright act solidified the position of the author at the centre of British copyright law. Woodmansee states that with the act, 'Parliament, in evident agreement with Wordsworth's reasoning, placed the law in the service of art.'²⁰ Contemporaneously, courts in France were beginning to promulgate the moral rights of the author as Bohemian Paris enjoyed its great flourishing. The modern conception of copyright evolved during the period that we now label 'Romantic'.

Many writers have noted the importance of the Romantic author to copyright law.²¹ However, while they protest that legal institutions assume an idea of Romantic authorship unquestioningly, they are also guilty of assuming what the 'Romantic author' means. The phrase is rarely unpacked; its construct is assumed as a given and the business of criticising copyright on this uncertain ground continues.

The assumptions that we assume to be 'Romantic' may, however, be a disservice to those artists whom we hold up as embodying Romanticism. For the purpose of this thesis, this may not matter: we are more concerned here, as with rock music later on, with the myths that permeate artistic production. If the bourgeois hijacking of Romanticism results in a distorted picture, it is that distortion which feeds copyright practice and rhetoric. In this chapter, however, I shall attempt to provide a more complex picture of Romanticism than that given by copyright scholars, and begin to detail the relationship between Romanticism and copyright. I shall firstly discuss some of the key features of Romanticism before returning to Wordsworth. I will argue that the motivations behind Wordsworth's obsession with copyright offer us a more sophisticated way of understanding copyright in relation to Romanticism. However, Romanticism has become a social stereotype, and the development of this ideology will be the feature of the third section. Finally in this chapter, I shall offer tentative suggestions as to why this ideology has become the socially dominant way of thinking about art.

²⁰ Woodmansee, 1994, p.157.

²¹ The most important being Woodmansee, Jaszi, Boyle, Aoki and Rose.

The intricacies of Romanticism become clearer when we try to define a periodisation. Romanticism in English literature is commonly held to occur in the period 1780-1820 while Romanticism in music occurred later (1825-1900). Romanticism had its own particular forms within different territories. The flourishing of the concept of the Romantic author began in Germany and was transported to England mainly through Coleridge's plagiarism. Romanticism in France and the United States flourished later. Bohemianism, the disfigured child of Romanticism only caught the public imagination in France in the 1850s²² while Romanticism only became an accepted collective term in England in the 1860s.²³ Furst has detailed these 'contours of European Romanticism' in some detail.²⁴ Perhaps these fluctuations are to be expected in a movement that cherished diversity in response to earlier eighteenth century universalistic themes.²⁵

Nonetheless, there are some common themes within them. In this section, the focus is on the German and English strands of Romanticism. German ideas concerning originality and authorship were hugely influential in both England and France in the early nineteenth century. Later I shall discuss French Romanticism in relation to Bohemianism and the development of the stereotypical artistic personality. The elements of Romanticism specific to America shall be discussed in relation to rock music later in the thesis.

The conventional way of understanding Romanticism is that it reflected the uncertainties of artists in response to the marketisation of art. The idea of art providing a superior truth and the artist as a special individual were developed by artists who had previously been supported by patronage and were now being faced with an anonymous popular taste for which to cater. Martha Woodmansee's work is perhaps the best example of this argument.²⁶ This approach is, however, a little too one dimensional. It is certainly true that the evolution of the art market is a crucial factor in the unfolding of Romanticism. It may even be the most important factor. But the ideas of Romanticism reflect wider social considerations than merely the development of the market, most notably individualism, Enlightenment rationality (English Romanticism was concurrent with the French Revolution) and the development of private property. Without an understanding of the role

²² Seigel, 1987, p31.

²³ Butler, 1981, p.1.

²⁴ 1979, C1.

²⁵ Ibid., p.6.

²⁶ See especially Woodmansee, 1994.

that these components play in the enunciation of Romanticism, we are left with an incomplete picture.²⁷

The strands of Romanticism develop out of an increasing worry concerning over the effects that a blossoming capitalism was having on human life. At this time, the institution of art became a social critic: 'the most obvious feature common to all the arts of Western nations after 1750 was the refusal to validate the contemporary social world.'²⁸ The features of Romanticism that reflect this are: the turn to nature as being the 'place' where humanity could be in harmony with the world and God; a turn to the exotic; and a historical turn, such as a fascination with old English folklore.

The key effect of the marketisation was a change in an artist's relationship to his audience. The expansion of the reading public resulted in a huge increase in the number of openings for writers, such as the rise in the number of journals in England and the proliferation of the dailies in Paris. Some of the most popular writers became quite wealthy and it is here that we begin to see the professionalisation of writing into authorship. In a tradition that continues up to the present day, a theory of art for the market developed in the eighteenth century that stated that the artist had succeeded if he made the reader feel nice. This is instrumentalism. The worth of a poem was judged by the pleasant feelings it engendered in its audience. Nowhere in this theory are the educative powers of art mentioned. It is no surprise that such a theory should develop as the market develops: popularity must prove the arbiter of artistic success. It is also reflective of the cultural class struggles occurring between the aristocracy and the bourgeoisie. Though the bourgeoisie was gaining economic and political power, it was self-conscious about its philistinism (utilitarianism having no place for art). It countered the aristocracy's (and artists') derision by nurturing the theory of 'I may not know art but I know what I like.'²⁹ 'Liking' something became the important element of art for the bourgeoisie, and the social institution that could regulate popularity was the market.

²⁷ This is hinted at, but not developed by Williams: 'The element of professional protest is undoubtedly there but the larger issue is the opposition on general human grounds to the kind of society being inaugurated.' 1993, p.36.

²⁸ Butler, 1981, p.16. This goes against the stereotype of the artist divorced from society, as Williams acknowledges: 'Wordsworth wrote political pamphlets...Blake was a friend of Tom Paine and was tried for sedition...Coleridge wrote political journalism and social philosophy...Shelley, in addition to this, distributed pamphlets in the street...Southey was a political commentator...Byron spoke about the frame riots and died as a volunteer in a political war.' (1993, p.30)

²⁹ Campbell, 1987, pp.148-160.

Many authors were not well rewarded, however, and it is some of these less successful authors who made the pronouncements on the social position of art that have had such a lasting impact upon society. Instrumentalism obviously created problems for those who were not popular. One such artist was Friedrich Schiller. Woodmansee details how Schiller's own arguments, which culminated in *On the Aesthetic Education of Man* ('It is only through beauty that man makes his way to freedom') was a personal reaction to his failure to please the market. Woodmansee particularly focuses upon Schiller's criticisms of Gottfried Bürger, whose poem *Lenore* had taken Western Europe by storm. *Lenore* was written in the plain language that would characterise the literary revolution of the *Lyrical Ballads* in 1798. In 1791 Schiller wrote an anonymous review of *Lenore* which represented a turning point in his thought. In it he said that Bürger did not 'deserve the name of poet.' The review stated that only Art could recover a sense of unity for humanity which was being fragmented by the current moves to specialisation. Schiller argued that a poetry that tried to reach to all the classes would only become lowest common denominator work. Instead the poet should 'supply a purer and intellectually richer text for the outpouring of affects that seek expression in language.'³⁰ The poet should, through his intellectual refinement, educate the masses through poetry. Here we see the beginning of the elevation of the artist. The artist is a superior being who has the elevated duty of uncovering Truth.

The concomitant of this position of the artist as an exalted teacher is the incompatibility of art and the market. If pleasure is forsaken for moral guidance then most readers will turn away and find something more pleasurable. Schiller's attempts to follow his aesthetic ideals and educate the reading public failed. He was financially insecure until he received patronage from a Danish duke. Immediately after acquiring a patron, Schiller wrote 'I now know that it is impossible in the German world of letters to satisfy the strict demands of art and simultaneously procure the minimum of support for one's industry.'³¹

Schiller is in many ways the paragon of the Romantic artist. In his work we find the cause of art as being more noble than any other, the position of the artist as a special human being and the immiscibility of art and the market. It is Wordsworth, however, who offers us a more sophisticated development of these ideas. Wordsworth's ideas about poetry and pleasure were more complex than Schiller's crude dichotomy. In his ideological conviction

³⁰ Quoted in Woodmansee, 1994, p.77.

³¹ Quoted in *ibid.*, p.84.

for eternal copyright, we can find the germ to explain why Romanticism still has such a strong grip on popular consciousness today.

The property of poetry: Wordsworth and copyright

The effort that Wordsworth, already well into the twilight of his life, put into the copyright campaign is astonishing - Eilenberg declares that Wordsworth was 'obsessed' with the topic. Yet there is something apparently unsavoury about the supposed paradigm of the Romantic author campaigning for Earthly material interests. Critics of Wordsworth have used the episode to highlight the poet's growing conservatism. As Swartz puts it, there is 'a potentially indecorous slippage between aesthetic and economic codes, that threatens to expose Wordsworth's well known indifference to the marketplace as something of a convenient lie.'³²

Yet to accept the critics' claims is to fall into the Schillerian trap of fetishising aesthetics. If material self interest was the only reason for Wordsworth's interest in copyright, then it would have made far more sense for him to focus on international copyright legislation, an area where he was missing out on much more money but, unlike Dickens a few years later, in which he showed no interest.³³ The reasons for Wordsworth's passion to secure eternal copyright (he supported Talfourd's initial proposal of life plus sixty years as a poor compromise) are more complex than mere self interest. They reflect some of the central concerns of Romanticism, and indeed, bring into question the traits with which later commentators came to characterise Romanticism. In particular, Wordsworth's placement of the author on both sides of the fictional border between art and commerce calls into question the convenient explanation that Romanticism emerged as a response to the commodification of culture.³⁴

It should be no surprise that Wordsworth was interested in his own property. Since his earliest work, his poetry had exhibited a preoccupation with prevailing ideas of property that were developing in the late eighteenth century.³⁵ Wordsworth had often analogised literary property with land, although he accepted that the analogy did not work perfectly for

³² 1992, pp.485-486.

³³ See Joseph, 1994.

³⁴ Swartz, 1992, p.456.

³⁵ For details of ideologies of property in Wordsworth's work, see Schoenfield, 1996, and Murphy, 1993, C5. For particular poetic examples, see *Michael* and *Goody Blake and Harry Gill: A True Story*.

land existed before ownership whereas literary property grew out of the very tissue of the owner. Yet Wordsworth also had reservations regarding the commensurability of literature and commerce. In a letter during the copyright campaign he wrote:

Still there has always appeared to me, something monstrous in the existing relationship between Author & Bookseller or Publisher, as regards remuneration of this sort – a positive reversal of the natural order of things, as we find it obtains in all matters else – a subservience (pro tanto) of the spiritual to the material.³⁶

The following sections look at the reasons behind Wordsworth's intense interest in the property of poetry (in the form of copyright). The first of these sections looks at ideas of immortality and inheritance of the individual self that are the foundation of Romanticism; the second focuses on Wordsworth's views of the literary marketplace and the relationship between author and reader. In his opinions on copyright, Wordsworth had to think a series of profound contradictions which can be seen to characterise the contradictions of modern day Romanticism.

Immortality and inheritance: copyright as tombstone

In 1819 Wordsworth was asked to contribute toward a memorial for Robert Burns. He refused, stating that Burns had 'raised for himself a monument so conspicuous, and of such imperishable materials, as to render a local fabric of stone superfluous, and therefore, comparatively insignificant.'³⁷ The only true monument to the poet was his own work. However, Wordsworth added 'I humbly think, in the present state of things, the sense of obligation to it may more satisfactorily be expressed by means of pointing directly to the general benefit of Literature.'³⁸ Suitable efforts should be put into reforming copyright instead, money rather than monuments. Eilenberg points us to the etymological similarity of the two, both stemming from the verb *monere* meaning to warn or to remind. For

³⁶ Fragment of a letter in prose 3:317.

³⁷ Quoted in Eilenberg, 1989, pp.354-355.

³⁸ Ibid.

Wordsworth, copyright was not so much about greed but a monument to the deceased poet, not a market mechanism but the battleground of eternal life.³⁹

As stated earlier, the 1814 copyright act linked, for the first time in the UK, copyright to the duration of the author's life. This now meant that for an author to consider copyright meant to consider one's own mortality. Wordsworth, already an old man, had more reason than most to be so occupied. However, despite much of his public concern being about the financial fate of his family when he died, it was perhaps not the most pressing criterion. Indeed, in his anonymous letter to the Kendal Mercury, he writes not of dead authors, but of quality books becoming 'dead letters' under current (1814) legislation. With no copyright protection, publishers would not publish worthy books, choosing instead to publish cheap popular editions. Copyright was not only a life assurance policy, it was also a tombstone, and it was with the tombstone that Wordsworth was obsessed.

Questions of the poet's mortality and immortality play a large part in his views on copyright. As Eilenberg puts it,

...as that branch of law that takes as its subject the relation between writing and materiality, copyright is the legal counterpart to epitaph, that form of writing most conscious of its materiality... copyright assumes not only the functions of epitaph but its ambiguities as well. It serves as a memorial to the work whose immortality it asserts. Attempting to compensate for the corruptibility of writing, it makes tacit admission of the frailty of words.⁴⁰

Hesse makes a similar statement regarding the French copyright law of 1793. She states that relocating Rousseau and Voltaire to the public domain 'was the legal parallel to the civic rituals that unearthed them from private gravesites and reposed their bodily remains in the

³⁹ There is a similarity here between copyright and sound recording. When the recording of sound first became a reality in the late nineteenth century, it was the immortality of the speaker that proved most shocking to the public: 'It has been said that science is never sensational: that it is intellectual, not emotional; but certainly nothing that can be conceived would be more likely to create the profoundest of sensations, to arouse the liveliest of human emotions, than once more to hear the familiar voices of the dead. Yet science now announces that this is possible, and can be done... Speech has become, as it were, immortal.' *The Scientific American*, 17/11/1877 on Edison's invention (taken from Geoffrey Rubinstein, 1994, *The Phonograph* available at <http://www.digitalcentury.com/encyclo/update/phono.html>, visited 14/1/00).

⁴⁰ Eilenberg, 1989, p.368.

public temple of the Pantheon.’⁴¹ For Wordsworth, an eternal copyright would keep the poet alive forever, the unique creation of the unique self.

As mentioned earlier, Wordsworth accepted the analogy between poetry and land was imperfect for, while land existed before the individual, ‘who will suggest that if Shakespeare had not written *Lear*, or Richardson *Clarissa*, other poets and novelists would have invented them?’⁴² But what was also true, according to the poet, is that poetry, like land, should be able to bequeathed to one’s heirs and many of his public proclamations on copyright focused upon the needs of the poet’s family following his death. The role of the author’s heirs has been central to debates on copyright, up to and including the US extension act of 1998 and current EU harmonisation proposals.⁴³ Wordsworth is here trying to think another contradiction: the inheritability of the unique self embodied within the poem.⁴⁴ To do this, he borrows from Burke the legal concept of entail – the restriction of ownership of one’s property to one’s heirs. Early industrialists founded businesses to create dynastic families so that they could remain immortal through their loins. According to Burke, entail turns a family into ‘a permanent body composed of transitory parts’; ‘the whole, at one time, is never old, or middle aged or young, but in a position of unchangeable constancy, [and] moves on through the varied tenour of perpetual decay, fall, renovation, and progression.’⁴⁵

Wordsworth is again trying to obtain immortality, this time through his sons, whom he sees as just as much a part of him as his poems. But we are faced with the same problem as above: how does Wordsworth deal with the contradiction of unique creations of the unique self becoming a *post mortem* property? Perhaps the true answer is that he cannot: Wordsworth cannot achieve immortality through property. However, his attempts to square the circle using copyright are worth noting. In effect he tried to turn himself into a one man family line.⁴⁶

We shall discuss Wordsworth’s attitude to the literary marketplace below, but one thing is worth noting here from the 1815 *Essay, Supplementary to the Preface*: in distancing

⁴¹ 1991, p.123.

⁴² In de Selincourt, 1939, p.934.

⁴³ This was a point strongly emphasised by the songwriters (and their families) who made statements in support of the US act, such as Bob Dylan (‘The impression given to me was that a composer’s songs would remain in his or her family and that they would, one day, be the property of the children and their children after them.’) and E. Randol Schoenberg, grandson of the arch-Romantic Arnold Schoenberg (‘families...are the intended beneficiaries of the copyright term’). Quoted in Lavigne, 1996, fn.110.

⁴⁴ See Michaels, 1996, C4.

⁴⁵ Quoted in *ibid.*, p.227.

⁴⁶ *Ibid.*, p.216.

himself from the world of commodities, Wordsworth invokes the canon of English writers. Wordsworth argues that great poetry is truly original because it is truly traditional.⁴⁷ Great poetry is not an individual property but the property of all generations of a family (the canonical English writers). This common property is a language that exists outside of their time and is restricted to an exclusive line of poetic fathers. In repudiating the worst excesses of the modern novel, Wordsworth aligns himself with Shakespeare, Milton and Chaucer. 'He both disinherits himself and claims a legacy.'⁴⁸ Keats performs a similar trick by talking of the 'genius of poetry' rather than the genius of any individual.⁴⁹ This creates a family of great poets and we thus return to the importance of the family for Romanticism. Boyle states that the Romantic conception of the family fulfils many of the same social functions as the Romantic conception of the artist.

...there is the eerie resemblance between the romantic conception of the author and the romantic conception of the family. Both art and the family come to be seen as a source of immortality, a non-instrumental arena for passionate self-expression, a haven from the pressures of commerce and so on. My suggestion is that – if we trace out the historical development of these ideas in their economic and cultural contexts – we will find a whole series of parallels.⁵⁰

It is noteworthy that understandings of creation emerging from the Romantic period often stressed the paternal relationship between author and work. While making the first assertion of authorial property in England in 1709, Defoe stated 'A Book is the Author's Property, 'tis the Child of his Inventions, the Brat of his Brain'.⁵¹

One feature of the familial analogue is a twofold way of conceiving of inheritance – both familial bonds and inheritance from earlier selves. Wordsworth often commented that the genealogy of his poems stemmed from his earlier selves and not his literary forefathers. According to Michaels

⁴⁷ Ibid., p.218. The role of tradition in composition is one of the challenges to the Romantic author used by critics of copyright and will be discussed in chapter 4. It is also one of the primary impulses in rock music, mainly in its reverence towards blues music. This will be discussed in chapter 5.

⁴⁸ Ibid.

⁴⁹ Williams, 1993, p.44.

⁵⁰ Boyle, 1988, p.643.

⁵¹ Quoted in Rose, 1993, p.39.

The unreproducible originality of Wordsworth's own perceptions is claimed as a legacy. He does not so much formulate the notion of self-improvement as rework an older notion of inheritance from oneself, understanding his own psychological development as a series of legacies from earlier William Wordsworths⁵²

Writers such as Siskin (1981) have commented upon Wordsworth's role in the development of the modern conception of the self from a static entity to a dynamic one, capable of self improvement and valorisation by society. This takes on a very concrete form in the case of the composition of the *Prelude*, the major poem which Wordsworth would not release until after his death because of copyright protection. Stillinger has detailed the long history of its composition:⁵³ Wordsworth began writing it in 1799, finishing a thirteen book poem in 1805. Over the next 34 years, he revised at least half of the 8500 lines, and a fourteen book poem was finally published three months after his death in 1850. Stillinger uses this history as an example of the author revising his own work and against a static notion of Romantic authorship. He argues that Wordsworth maintained a conception of the individual being composed of historically distinct selves, so that the later poet revising the work is a different person to the younger poet who initially composed the poem. This is described by Wordsworth in the *Prelude*

...so wide appears
The vacancy between me and those days,
Which yet have such self-presence in my mind,
That, musing on them, often do I seem
Two consciousnesses, conscious of myself
And some other Being⁵⁴

Wordsworth's concern with family bonds seems to have taken off in many different directions. Firstly, there is the legacy of the canonical English writers, a legacy that Wordsworth claims for himself by proclaiming his originality. Secondly, there is an

⁵² 1996, p. 227.

⁵³ 1981, pp.74-77.

⁵⁴ Quoted in Stillinger, 1981, p.73.

inheritance from his earlier selves. Thirdly, there are his poems, which are seen as his artistic children. Finally, there are his heirs (whom Wordsworth sees in much the same light as his poems). Wordsworth conceives of his sons as a part of his own self like any of his other creations. This is why he attempts to create a Wordsworth dynasty through his family and through his poems; they are both attempts to achieve immortality of Wordsworth's own unique personality. It is also why he thinks his heirs can be trusted to secure his authorial integrity rather than the rogues of Grub Street.⁵⁵

It is thus short-sighted to see Wordsworth's interest in copyright in merely financial terms. Rather, a significant aspect of copyright is that it features as a legal embodiment of the very personality that Wordsworth, as a leading figure of Romanticism, is said to have helped create. As such, copyright is one way in which the author can seek to achieve immortality.

The author, his readers and the market

Despite its critical mauling from Schiller, *Lenore* was a huge hit in England and enamoured Coleridge to its cause, though Wordsworth was more sceptical. However, its impact upon the *Lyrical Ballads*, released in 1798, was surely considerable. The publication of *Lyrical Ballads* was a revolution in English poetry. The authors (it was published anonymously) asked educated readers to view it as an experiment as to how far 'the real language of men in a state of vivid sensation' could be used to the purposes of poetry.⁵⁶ This may suggest that Wordsworth and Coleridge were following an instrumentalist aesthetic, but this would be incorrect. Wordsworth is as equally opposed to the dumbing down of literature via the market as Schiller. But whereas Schiller had subordinated pleasure to education, Wordsworth believed that the purpose of poetry was to educate *through* the medium of pleasure. This requires poets to achieve more than Bürger's mere descent into sentimentalism.⁵⁷

⁵⁵ Wordsworth would have been disappointed in this regard. While he became a publishing phenomenon in the period following his death, there was a bitter battle between his two sons – John and William Jr – over the renewal of their father's publishing contract with his long time publisher Edward Moxon in 1857. See Gill, 1995.

⁵⁶ *Preface to the Lyrical Ballads* (1802 and 1850), in *Prose* 1:118.

⁵⁷ The concept of sentimentalism had a bad name by the end of the eighteenth century. Campbell describes how sentimentalism was a common feature of mid to late eighteenth century society (epitomised in Austen's *Sense and Sensibility* – written in 1797, published in 1811) as a reaction to the encroaching

But though this may be true [that poetry is the ‘spontaneous overflow of powerful feelings’], Poems to which any value can be attached, were never produced on any variety of subjects but by a man who being possessed of more than usual organic sensibilities had also thought long and deeply.⁵⁸

Wordsworth explained the process by which poems can be considered to be drawn from feeling but also refined by the poet’s sensibilities

It [poetry] takes its origin from emotion recollected in tranquillity: the tranquillity gradually disappears, and an emotion, similar to that which was before the subject of the contemplation, is gradually produced, and does actually exist in the mind.⁵⁹

This is nowhere better encapsulated than in *Daffodils*

I WANDER'D lonely as a cloud
That floats on high o'er vales and hills,
When all at once I saw a crowd,
A host, of golden daffodils;
.....
For oft, when on my couch I lie
In vacant or in pensive mood,
They flash upon that inward eye
Which is the bliss of solitude;
And then my heart with pleasure fills,
And dances with the daffodils.

rationalism in everyday life. By the end of the eighteenth century, however, individuals displaying their sentimentality had resulted in histrionics and people began to turn against exaggerated displays of sensitivity. Campbell goes on to discuss the importance of this cult of sensibility for the development of Romanticism. 1987, pp.142-148.

⁵⁸ *Preface to the Lyrical Ballads* (1802 and 1850), in Prose 1:126

⁵⁹ *Preface to the Lyrical Ballads* (1802 and 1850), in Prose 1:148

Wordsworth's conception of poetry changed as his conception of the relationship between the poet and his audience. This changing relationship can be illustrated by comparing the preface of the *Lyrical Ballads* written in 1802 with the 'Essay, supplementary to the preface' written for the revised version in 1815. In the 1802 Preface, although the poet is defined as a creative individual ('possessed of more than usual organic sensibilities'), he is also defined as being a 'man speaking to men'. Wordsworth's attitude toward his readers is uncertain. The advertisement of 1798 seems aimed at the middle and upper class readers, yet he does not want to discourage even 'the most inexperienced reader'. The first point here is Wordsworth's egalitarian nature – he displays an unswerving belief in the 'inherent and indestructible qualities of the human mind'⁶⁰ that pervades all of society's echelons and, despite despair later in his life over these qualities, he remained true to this belief throughout his work. The second point is that Wordsworth was trying to be more popular than most contemporary poetry and so, while trying to woo the inexperienced reader, he also makes rhetorical apologies to educated readers for the lack of sophisticated poetic technique in the work. Wordsworth's uncertainty over the specific readership at which he is aiming leads him to create an idealised readership. Because of the fragmentation caused by an encroaching capitalism, Wordsworth searches for an idealised human spirit that transcends differentiated social roles.⁶¹ He is thus trying to achieve the unity that Schiller saw as the function of art while at the same time maintaining the compatibility of art and market (through the mechanism of copyright). The central problem of capitalism for Wordsworth was not economics but what it did to people's minds. He thought that the social developments of industrialisation led to people seeking cheap and gaudy pleasures in the literary marketplace. He thus saw the poet's role as attempting to evade these problems by teaching truth through the medium of pleasure (thus his attempts to use the real language of men): 'Every great Poet is a Teacher; I wish to be either considered as a Teacher, or nothing.'⁶² Wordsworth's sense of 'teaching' at this point should not be taken in any sort of didactic way. Campbell has noted how earlier artists saw the role of art as purveying moral truth through the medium of pleasure but argues that, for the Romantics, moral truth is supplied by giving pleasure. Pleasure is the medium of truth. In this way, truth is not dictated by the poet, but is felt, or understood by the reader almost instinctively.

⁶⁰ *Preface to the Lyrical Ballads* (1802 and 1850), in *Prose* 1:130

⁶¹ See Rowland, 1996, C2.

⁶² In de Selincourt, 1937, p.195.

Wordsworth wanted his readers to understand his message not because he had taught them anything but because they already inherently agreed with him and he became increasingly desperate when this was not the case.⁶³ He sees the relationship with the idealised individual reader as what Heinzelman terms ‘an economics of compensation’ – the poet’s labour in creating the poem is matched in equivalent by the reader’s labour in reading and working on understanding the poem.⁶⁴ Poet and reader stand as equals. Wordsworth’s early work centred on the social role of the poet as teacher.⁶⁵ And his students were his contemporaries, not future generations.

The reality was slightly different. Wordsworth’s poems did not become popular until late in his life and his sales could never match the popularity of the leading Gothic novels of the time. Wordsworth became increasingly bitter and to solve the contradiction between his theory and reality, he began more and more to separate the idealised reader from the real men and women whose minds he saw as being destroyed by capitalism, resulting in a ‘degrading thirst for outrageous stimulation.’⁶⁶ He was constantly aware of people being a victim of the social forces that dominated them but could not shake the tendency to blame them for their inability to resist those tendencies.⁶⁷ This had two outcomes: a change in view of the relationship between author and reader; and a hostile and continual attack on the literary marketplace that satisfied the thirst for outrageous stimulation, and it is in that arena where many of Wordsworth’s pronouncements of copyright developed.

This can best be seen in the 1815 *Essay, supplementary to the Preface*. Poetry was at this time having an unprecedented market boom, but Wordsworth was not party to it and in the *Essay* he responded to the ‘unremitting hostility’ to the poems since their publication. In the *Essay*, his approach has changed from one seeking acceptance from his contemporaries to one which argues that good art can never be judged contemporaneously. Wordsworth gives a detailed list of the history of English taste, listing how previous great poets such as Spenser and Milton were similarly dismissed during their own lifetime only to be appreciated much later in history. This change in approach leads Wordsworth to conclude ‘every Author, as far as he is great and at the same time *original*, has had the task of

⁶³ Campbell, 1987, p.190.

⁶⁴ See Heinzelman, 1980, C7.

⁶⁵ *Ibid.*, 204. See *The Prelude*, among others, for examples of Wordsworth’s concern about the social role of the poet.

⁶⁶ *Preface to the Lyrical Ballads* (1802 and 1850), in *Prose* 1:130.

⁶⁷ Rowland, 1996, p.44.

creating the taste by which he is to be enjoyed.’⁶⁸ This idea of the temporal judgement of poetry is critical for the developments in copyright at this time (the 1842 Act was to protect ‘Literary Works of lasting Benefit’).⁶⁹ Wordsworth wrote in 1808 that only a perpetual copyright would do justice to the great works of literature that would not be fully appreciated until a later time:

The law, as it now stands, merely consults the interest of the useful drudges of Literature, or of flimsy and shallow writers, whose works are upon a level with the taste and knowledge of the age; while men of real power, who go before their age, are deprived of all hope of their families being benefited by their exertions.⁷⁰

If a work of art cannot be judged, and will not be appreciated, for generations to come, then a copyright that expires at any given point cannot do justice to the right of a poet to receive compensation for his inspiration. Any finite copyright term will only protect those hacks who feed the public’s desire for quick and easy thrills.

Wordsworth attempts to hold onto his earlier ideas by a philosophical sleight of hand. He redefines the audience for which he (and other great poets) are writing by reifying the demarcation between the idealised reader willing to put effort into poetry, and the actual reader who seeks instant gratification. This is defined in terms of the people and the public.

Still more lamentable is his [the poet’s] error who can believe that there is any thing of divine infallibility in the clamour of that small though loud portion of the community, ever governed by factitious influence, which, under the name of the PUBLIC, passes itself, upon the unthinking, for the PEOPLE... To the People, philosophically characterized, and to the embodied spirit of their knowledge, so far as it exists and moves... his devout respect, his reverence, is due.⁷¹

⁶⁸ *Essay, Supplementary to the Preface* (1802), in *Prose* 3:80. Emphasis in original.

⁶⁹ It would be Romantic indeed to suggest that Wordsworth plucked this conception of literary worth out of the air. The notion of longevity proving literary worth had developed in the eighteenth century – Samuel Johnson had stated that Shakespeare lasting a century was evidence of his greatness in a preface to a Shakespeare anthology. Rose, 1993, p.118.

⁷⁰ Letter to Richard Sharp 27/9/1808 in de Selincourt, 1937, p.242.

⁷¹ *Essay, Supplementary to the Preface to the Lyrical Ballads* (1815), in *Prose* 3:84.

Wordsworth must now write for the people ‘philosophically characterized’ in order to meet the demands of his instrumentalist ethic and the higher responsibilities of great poetry – poetry must educate readers through pleasure. In doing this, however, Wordsworth is no longer a ‘man speaking to men’ and, for his own times at least, has become an authoritarian teacher whose personal characteristics set him apart from his fellow men. Rather than a relationship of equivalence between the author and reader, the poet becomes the one who controls the relationship: ‘Therefore to create taste is to call forth and bestow power, of which knowledge is the effect.’⁷²

What is perhaps the most significant change in the conception of art and artist is the individualisation of artistic creation. The solitariness of the poet can be adduced from Wordsworth’s descriptions that we have just examined. As Parrinder explains:

In Wordsworth’s theory, as we have seen, the poet’s authority does not derive from his command of language [adherence to a set of poetic rules]. But while poetry is the natural expression of the ordinary and basic emotions of life, this does not mean that poetic success is open to all. The poet is a man of exceptional gifts, who has rigorously cultivated his mind through a discipline of meditation. Having done this, he can boast, as Wordsworth does, that each of his poems has a “worthy purpose”. The poetry may have its source in the springs of inspiration, but it has been duly filtered through the poet’s conscience and moral sensibility. It is notable what a solitary and internalized picture this gives of poetic creation. The key determinants – the author’s mental endowments, his experiences of observation and habits of meditation, and finally the inspiration itself – are all held within the self.⁷³

It is only in the latter half of the Romantic period that inspiration becomes understood as truly found within the artist’s self. As mentioned above, Romanticism was in essence a reaction to the social problems created by a blossoming capitalism. Urbanisation, specialisation, mechanisation, poverty were all held as problematic. One of the artistic responses to these problems was a return to nature. It was in nature that we could rediscover

⁷² *Essay, Supplementary to the Preface to the Lyrical Ballads* (1815), in *Prose* 3:82.

a unity, both with humanity (what made us all essentially human) but also in a pantheistic sense – with God. God was to be found in nature and not in the factories. There is a formal similarity here with the notions of originality being developed in the mid-eighteenth century. Originality was seen as organic and natural. The most famous treatise on originality, Edward Young's *Conjectures on Original Composition* states that an original work

...may be said to be of a *vegetable* nature; it rises spontaneously from the vital root of genius; it *grows*, it is not *made*. Imitations are often a sort of *manufacture* wrought up by those *mechanics*, *art* and *labour*, out of pre-existent materials not their own.⁷⁴

While the germs of what later became the accepted idea of individual inspiration are there in Young's essay - and its importance as a turning point in the move from a valuing of craft based adherence to rules is unrivalled - his account of 'originality' in the essay is mainly mimetic rather than expressive. Originality is to be found in nature and it is the artist's task to reflect this. It is only later that the source of originality becomes accepted as rooted in the individual themselves. Parrinder puts this development in Wordsworth between 1800 and 1802.⁷⁵ It is no great surprise that such a development should occur at this time. The increasing prominence of the cult of the individual, particularly following the French Revolution provides an opportunity for the creative inspiration to be internalised into the conception of our unique selves. Furthermore, for many English Romantics the Terror of the 1790s made the People an object of fear and suspicion. Coupled with market failure, the inward turn was a rejection of the emancipatory capabilities of the people.

The fact that originality becomes internalised means that it transforms from a mimetic to an expressive concept. Art becomes the expression of the artist's inner self. This notion reaches its peak with the modernist avant-gardes of the early twentieth century when the creative imagination is represented by increasingly abstract artistic representation. Once we reach this point, we reach a conception of the artist that has become the hegemonic ideal and the basis of copyright law. The artist is a special individual who through his genius creates original works. When questioned why the artist should receive special protection for

⁷³ 1977, p.44.

⁷⁴ Quoted in Williams, 1993, p.37. Emphasis in Young's original.

⁷⁵ 1977, p.41.

their property, the answer comes back ‘because they are special.’ Originality is no longer a fact of nature but of the individual, and thus of the individual’s work. Art maintains a lofty position because it offers a chance to recover a lost unity, and is thus in a sense a ‘displaced theology’.⁷⁶ The artist, whose position has been elevated to one who can reveal these higher truths to us naturally takes on an elevated role in society. The writer gains Authority and becomes an Author.

Wordsworth’s changing views resulted in a hostile attack on ‘literary fashion’ which featured heavily in his speeches on copyright and has remained the basis of common sense ideas about art ever since – a dichotomy of the pure disinterested work above the market on the one hand and the work produced for the market on the other. However, this is obviously incompatible with Wordsworth’s desire for perpetual copyright of works of genius.

Wordsworth’s own view on the relationship between art and market was more sophisticated than the caricature. As Swartz points out ‘Wordsworth figures the unique productions of “original genius” not as ideal objects transcending market determinations, but as sublimated commodities, or commodities of genius, occupying their own, unique position within the market.’⁷⁷

The Romantic author in French copyright

The ideas of individuality and immortality that, as described above, are associated with copyright are quite sophisticated. Similarly, Wordsworth’s ideas of the relationship between the reader and his audience, though sometimes contradictory, are also complex. However, during the nineteenth century, a stereotype of a crude dichotomy of art and market gained widespread currency. Perhaps the most prominent example is in Bohemia in nineteenth century Paris. This growth of the cult of genius in France also assisted the centralisation of the author in French copyright law, though over a longer period of time than in the UK. The essence of the protection granted to authors in French law can be found in the *droit moral*. *Droit moral*, or moral rights,⁷⁸ have come to be recognised as the

⁷⁶ Woodmansee, 1994, p.20.

⁷⁷ Swartz, 1992, p.488.

⁷⁸ Swack has noted that ‘moral rights’ does not provide an adequate translation of *droit moral* because the English word ‘moral’ does not encompass the intellectual concept of ‘inner meaning’ and suggests that the German word *urheberpersönlichkeitsrecht*, meaning ‘the rights of the author’s personality’ is more appropriate. See Swack, 1998, fn.2. In this thesis, ‘moral rights’ and *droit moral* shall be used synonymously.

embodiment of authors' rights that are distinct from any economic rights to exploit the work. Most western copyright regimes now offer some form of moral rights but it is France that is viewed as the home and guardian of moral rights.⁷⁹

The story of how the author became so highly protected in French copyright law is briefly told in appendix 1, which provides details of the most significant cases in the development of moral rights. For our current purposes, it is important to note that, in under a hundred years from the decree of 1793, French copyright law underwent a major turnaround. By 1875 the highest court in the land, the Cour de Cassation declared 'in a conflict of interest between the public domain on the one hand and the authors or their heirs on the other hand, we always lean in favour of the latter.'⁸⁰ This transformation of French copyright law from the revolutionary tool of public enlightenment to the protector of authors' inviolable rights is astonishing and I cannot fully explain it here. What was a significant influence on this development, however, was the strength of the Romantic movement in nineteenth century France. Both LaMartine and Balzac petitioned Parliament prior to the 1844 Copyright Act, pleading for greater authors' rights; Balzac arguing that the public interest was the enemy of intellectual property rights.⁸¹ Hugo was a passionate advocate of authors' rights and instrumental in the establishment of the Berne convention.

The Berne Convention for the Protection of Literary and Artistic Works, established in 1886, was the first multilateral agreement on intellectual property. The impetus for the Berne convention came from the International Literary Association (later the International Literary and Artistic Association, or ALAI). This was an international body of (mainly French) authors, chaired by Victor Hugo. Berne is thus a piece of legislation actually driven by authors, and as such has authors' rights paramount in its rationale. Jaszi and Woodmansee point out that Berne is more than just a treaty:⁸² the first article of Berne, still present today (the current, sixth iteration of the convention was finalised in Paris in 1971) states that the signatory countries 'constitute a Union for the protection of the rights of

⁷⁹ Moral rights were introduced into UK law in 1988 and US law in 1990.

⁸⁰ Quoted in Peeler, 1999, p.452. It is worth noting that, just as the conception of the author as a public servant was slightly different in early French legislation, the strong conception of authorship that emerges in later French law is also distinctive. In its early form, discussed here, it does seem to be an attempt to move away from the idea of a property owning author that emerges in the UK. The French conception of authorship relies upon a notion of the Subject which is alien to Anglo-American understandings, though a critic such as Edelman would argue that the importance of the Subject to French copyright law is that it fulfils the need to create a legal entity that can own property.

⁸¹ Peeler, 1999, pp.450-452.

⁸² 1996, p.956.

authors in their literary and artistic works.’⁸³ Berne is a commitment that its signatories will support art and artists - it is an artistic union.

Berne deals solely with the rights of authors and does not cover publishers. It mandates that copyright protection should be granted for the life of the author plus fifty years. Berne also stipulates the inclusion of authors’ moral rights in article 6(bis). These moral rights are held to be distinct from an author’s economic rights, cannot be waived or sold, and are perpetual. Under Berne, copyright is available to both published and unpublished works. This means that copyright results from the very act of creation, and as such it states that a signatory government cannot mandate any registration or deposit be necessary for copyright protection. Berne is still of importance today: the TRIPs agreement introduced in 1993 states that all TRIPs signatories must adhere to Berne, with the exception of article 6(bis).

This group of French authors, committed to a notion of inviolable rights of authorship, in part developed its consciousness due to the authors’ rights granted in the 1793 decree – the act resulted in a number of lawsuits with minimal financial matter – showing once more how the law has helped shape our understanding of art.⁸⁴ French authorial consciousness grew in the nineteenth century, culminating in a ‘growing adoration of creative genius’ best characterised by the ideals of Bohemia.⁸⁵ However, the ideals of Bohemia proved to be slightly more black and white than the complicated understandings of creativity that I previously described as Romanticism.

Bohemianism: the development of the artistic stereotype

More than anything, Bohemianism cemented the popular idea of the tortured artist. Bohemianism is a social subculture distinct from any of the literary or artistic movements that helped in its creation. Romanticism was the first artistic movement to which it was attached, and thus many of the Romantic ideas about art became the foundation of Bohemianism. But Bohemianism is not a set of rules about artistic creation itself, rather it is a social movement concerning what it is to be an artist in modern society. Bohemianism helped define the modern conception of the artist and its echoes are heard today in the

⁸³ Berne Convention for the Protection of Literary and Artistic Works, September 9 1886, revised July 24 1971. art 1.1. Taken from http://www.wipo.org/eng/iplex/wo_ber0_.htm (visited 22/2/98).

⁸⁴ Scott, 1998, p.28.

popular music industry and elsewhere. The formal similarities between rock and Bohemia will be discussed in a later chapter. In this section I will outline how the Bohemians saw themselves as artists and how this conception became the popular definition of the artistic personality.

There are many reasons that nineteenth century Paris should prove to be the home of Bohemianism. The revolution of 1830 had finally enthroned the bourgeoisie as the ruling class. In no other country did the government rule directly in the name of one class.⁸⁵ With the accession to the throne of the Citizen King in 1830, and Guizot becoming Prime Minister in 1840, bourgeois political dominance was solidified. After 1830, the bourgeoisie started to become more self-assured and began to lean less on the cultural props of the aristocracy. However, although the bourgeois had power they had no standing. To be bourgeois was to be detestable – they had neither the splendour of the aristocracy nor the humility of the working class. The bourgeois traits of utilitarianism and efficiency were empty vessels. Although the English Romantics had been bitter toward the encroaching rationality of the time, it was in France that the subject of bitterness became consolidated into a hatred of the bourgeoisie. The political dominance of the bourgeoisie is thus one important factor in the rise of Bohemianism.

A second important factor is the cultural dominance of Paris itself. No other European capital held so much dominance over the rest of its country. London was bigger but the industrial revolution had shifted some of the economic power to the Midlands and the North, and the universities had been kept out of London. Paris, in contrast, was the economic and cultural hub of France. The proliferation of universities led to a high number of youthful, well educated individuals. Furthermore, Paris acted as a magnet for those in the provinces seeking personal and professional advancement. This resulted in a huge number of Men of Letters in the city (though as Grana points out, not many came to Paris to become professional Men of Letters. If one failed in one's aspirations to become a doctor or a lawyer, however, the 'profession' of Man of Letters became very tempting. To be a Man of Letters required no formal training⁸⁷). This was strengthened by the massive increase in the reading public, as in England and Germany. In Paris, however, this was more apparent because of the incredible number of dailies and journals published in the city. Two of the

⁸⁵ Peeler, 1999, p.432.

⁸⁶ Seigel, 1987, p.22.

most important outlets for writers in Paris were the *feuilletons* (the bottom half of the front page of a daily was given over to literature) and the *physiologies* (political pamphlets extremely popular in Paris in 1841 and 1842). This blossoming literary market, however, resulted in the same discrepancies of success as in Germany and England. Some of the main writers for the *feuilletons* became very wealthy. The vast majority, of course, did not.⁸⁸ The artist faced cruel odds – great success or starvation in a garret (bearing in mind that once an aspiring youth had decided upon the career of Man of Letters, he was unlikely to accept any work in other fields merely for the purpose of eating). Though less philosophically based, there was a certain repetition of events in Germany, but what was added in France was the naming of the ignorant readers (whom Wordsworth described as the public) – the bourgeoisie.

In response to the bourgeoisie's ignorance, artists began to seek ways of outraging and mocking them, and this led to the development of the Bohemian personality. The Bohemian took lobsters for walks on leashes in the Tuilleries gardens (for 'it does not bark and knows the secrets of the deep') or walked with a pet jackal.⁸⁹ They dressed extravagantly, drank heavily and screwed around. They shunned utilitarianism, celebrating feeling through excess, ignoring social and moral conventions in the search for a higher truth. Grana expresses the ideology of Bohemia in the following eight points:

The ideal of self expression. The most important purpose in life is to express oneself through creative work and to realize fully one's individuality.

The freedom of self-expression. Every law, convention, or rule which prevents self-expression or the full enjoyment of creative individual experience should be abolished or ignored.

The idea of genius. The creative powers of the individual are essentially unexplainable; they are a fact and a gift of nature.

The rejection of general or rational causality. Every event of natural or social reality is unique and should be apprehended directly in its living singularity.

⁸⁷ '[Man of Letters] is a title that serves to hide mediocrity and social uselessness.' Regnault, quoted in Grana, 1964, p.220.

⁸⁸ It is calculated that Baudelaire earned no more than 15,000 Francs during his life. Lamartine earned five million between 1838 and 1851. Benjamin, 1997, p.30.

⁸⁹ Grana, 1964, pp.74-75.

“cosmic self assertion”. The literary man is a demi-god, a natural aristocrat. He holds world-meaning in the palm of his hand and is the carrier of the higher values of civilization. Therefore, special respect is owed to him and special freedom should be granted to him.

The social alienation of the literary man. Paradoxically, though men of letters are the vessels of superior values, they are denied by their fellow men, whose main interests are material gratification and the enjoyment of the cruder forms of power.

The hostility of modern society to talent and sensitivity. The modern world is sunk in vulgar contentment and driven by a materialism which is essentially trivial and inhumane - regardless of the technological complexity or institutional efficiency which may accompany it.

World-weariness or “the horror of daily life”. Between the creative person and the surrounding society there is always an unresolved tension. The aspirations of the creative person are such that they can never be satisfied by ordinary existence. Daily life, therefore, is a constant denial and an intolerable burden.⁹⁰

It is relatively plain how these features have developed out of the features of Romanticism described earlier. In Paris, however, they became a mode of living. While it is very difficult to imagine Wordsworth involved in an orgy of drunken excess, this was how life was in Bohemia. This followed Romantic principles that excess leads to wisdom but was also to outrage the bourgeois. For what is at stake here is not so much a theory about art (few of those in Bohemia were significant artists) but the characterisation of the artistic way of life. The creation of this artistic myth is all important.

Much of this thesis concerns myths, for it is the myth of Romantic authorship that serves as a bedrock for copyright and it is the myth of Bohemianism (and rock music) that they are all Romantic artists. The myth of Bohemia was that this way of living was the only possible one an artist could live. More sophisticated critics, both after the event and within Bohemia itself, were aware that Bohemia was a mark of failure. Grana states that the Bohemian impulse was followed ‘by people of excitable imagination and modest talent.’⁹¹ To become a success in one’s art (whether commercial success equalled artistic success or

⁹⁰ Ibid, pp.67-68.

selling out) meant one was an unsuccessful Bohemian. Balzac suggested that Bohemia was a pleasant interlude until the real work arrived and Baudelaire, extremely ambivalent to Bohemianism, perfected the character of the Dandy in order to hold onto Romantic artistic principles while avoiding the gaudiness of Bohemia. Baudelaire understood that industry (what he termed ‘concentration’) was as important as inspiration to a successful artist.⁹²

One such critic became at least partly responsible for the appropriation of Bohemia into bourgeois ideology. Henry Murger lived in the physical, though not ideological, Bohemia for most of his life, and he was the writer who chronicled Bohemia more than any other (he was never successful in writing about anything else). He too was ambivalent towards Bohemia. The central theme of his work was of the problem of staying in Bohemia for too long: Bohemia was only a necessary apprenticeship for artists with no support in their early careers. He called those who stayed too long *la bohème ignorée*. It is this group who made up the majority of Bohemia. The amateurs who were only peripherally tied to the aesthetic order of Bohemia but were fundamental to its ‘moral structure’.⁹³ Murger’s stories attracted little attention when they appeared in Parisian newspapers. He wrote a play about Bohemia, with altered names barely concealing the identities of the real people about which he was writing. This failed to cause a splash but he transformed it into a musical in 1849 and this became extremely popular. Siegel states that ‘this was the moment when the image of Bohemia first caught the imagination of a broad public.’⁹⁴ The play enjoyed extended runs and had at least five revivals by 1890. It later became the basis of Puccini’s *La Bohème*.

The hegemony of Romanticism

I have found no sustained academic work on why Bohemianism and Romanticism should have become the hegemonic mode of thinking about the production of art to this day, particularly when many artists still see the primary function of art as being to challenge the ‘bourgeoisie’. This question, however, is not the central concern of this thesis and I can thus only offer one or two tentative suggestions.

⁹¹ Ibid, p.72.

⁹² Siegel, 1987, p.116.

⁹³ This is another similarity between Bohemia and rock music – amateurism. There is a neat reversal between the two: in rock the idea is that anyone can become a rock star but few do; in Bohemia only the selected few could become artists but everybody did.

⁹⁴ Siegel, 1987. For further details of Murger see Siegel C2.

The first suggestion is perhaps the most glib: exoticism and titillation. Middle class fascination with how the more extreme elements of society are supposed to live still survives today. It can be seen in newspapers' fascination with the lives of rock stars. Horror and outrage can be pleasurable sensations. With the separation of the world into three spheres, the realm of art provides a safe arena for the bourgeois to indulge their fantasies without the danger of such excesses spilling over into the real world.⁹⁵ And the portrait of Bohemia provided by Murger had been romanticised. The romanticised picture of poverty and friendship painted by Murger and duplicated by Puccini would have proved gratifying to middle class audiences. What would also have proved gratifying is Murger's self-portrayal as the poet Rodolphe for Rodolphe is ambivalent about Bohemia, and is set to leave following the death of Mimi at the end of the play. Rodolphe is only a temporary inhabitant of Bohemia and realises he must return to the real world. This ideological submission - Bohemians accepting that theirs was not the 'real world' - would have been pleasing to the hegemonic viewpoint.

Nonetheless, this would only seem to provide suggestions as to why Murger's play was so successful (although titillation is still a reason for an interest in Bohemia today). Another reason is the bourgeoisie's hijacking of the purpose of art. The bourgeoisie simplified Wordsworth's conception of education through feeling, and made art out to be merely the realm of feelings. As Campbell states, Bohemianism 'developed out of Romanticism, and took the moral instruction element out of art'.⁹⁶ At this position, the ideals of the bourgeoisie and *la bohème ignorée* merged. And from this, it is easy to say 'fine – if art is the realm of feelings, it can be the realm of bourgeois feelings.' There was a growing literature in the 1840s onwards that highlighted the sentiments of respectable life.⁹⁷ The bourgeois developed a parallel vision of cultural production that was compatible with the surface mythology of the Bohemians.

The complicity suggested here points to the fact that Bohemianism was from the outset a middle class and not an artists' ideology. The inhabitants of Bohemia were the disaffected children of the middle class. The university students who failed in their aspirations to become lawyers created a layer of the middle class which had an added element of freedom (many of them brought money from their families when they entered the

⁹⁵ Taylor, 1989, p.424. This is a point similar to Habermas' account of the failure of the modernist art movements being due to their relegation to the sphere of art.

⁹⁶ 1987, p.195.

gates of Bohemia). This situation was paralleled in Germany, where there was a population explosion but no economic growth to provide employment opportunities. As the aristocracy gave their children the available jobs, middle class children stayed on at university so as not to be unemployed, resulting in what Butler calls the 'bitterest and probably the best educated middle class in Europe.'⁹⁸ It is these disaffected middle class children who formed the amateurs in Bohemia, those who tried to turn their fantasies into a vocation. And it is this group - *la bohème ignorée* - that formed the moral basis of Bohemianism. Bohemianism was promulgated by the middle class itself. It is a disfiguration of its own ideals. The closeness of the relationship between Bohemian and bourgeois is suggested by both Seigel and Grana. The relationship is a dialectical one: the bourgeois try to adopt Bohemianism for its own ends by both isolating its anti-utilitarian tendencies into an artistic ghetto (literally and metaphorically) and by instilling bourgeois sentiment into art; the Bohemians reflect the ugly side of bourgeois ideology back into the faces of the bourgeois. The Bohemians both want to be acclaimed by bourgeois society and are repelled by it at the same time. They are fuelled by the knowledge that success will lead to the dilution of the Bohemian aesthetic but are desperate for financial reward to continue their extravagant lifestyle.⁹⁹ There are historical reasons as to why the artistic ideals of Bohemia and the bourgeois overlapped but it is the centrality of this dialectical relationship that ensures that the ideas of artistic production developed during the Romantic era are today hegemonic. The more sophisticated Romantics such as Wordsworth focused upon the realm of feeling as a counterbalance to the prevailing rationality. They did not, however, seek to destroy rationality but to ensure that rationality did not obliterate the importance of feeling in human relationships. Similarly, they did not posit the total incompatibility of art and the market, though Wordsworth was painfully aware of the difficulties of their uneasy relationship. But within Wordsworth's work they exist in a tense relationship, and his efforts on copyright were in some ways an attempt to give a fixed expression to the dialectical relationship of art and market. This becomes caricatured within the Bohemian movement to be the total incompatibility of art and the market, and of art and bourgeois society. The bourgeoisie diluted the Romantic ethic, both in wider society (through the popular cultural market) and through *la bohème*

⁹⁷ Ibid., p.120.

⁹⁸ 1981, p.73.

⁹⁹ This dialectical relationship exists in rock music: the artist wants to have her music heard by the widest number of people possible, but to do this runs the risk of selling out – diluting her message to appease public taste. Toynbee, 2000, p.27.

ignoree – the Bohemians with no artistic talent who were committed to a flamboyant refusal to adopt utilitarian values.

The process of centralisation in copyright, by which I mean that the author becomes the central figure in, and one who is used as the basis of copyright protection, is able to occur *because* of the elevation of the artist. Were it not for the elevation of the artist, the author would have seemed an arbitrary measure for copyright. The elevation of the artist, however, makes it seem natural that copyright exists for the protection of the artist. This process of elevation is greatly facilitated by Romanticism. It is not necessary to stress a causal relationship between Romanticism and copyright to understand that copyright would probably have developed in a much different way were it not for this growing artistic body of beliefs and their subsequent hegemonic impact.

The understanding of art that developed in the late eighteenth and nineteenth century developed because of the changing material circumstances in which artists found themselves, not least of which was the possibility of them becoming owners of ‘property’ once copyright legislation had been instigated. The developing consciousness of the French authors following the 1793 act is one example of artistic ideas developing out of changing material circumstances.

But the elevation of the artist that occurred in the Romantic period enabled copyright to come to be seen as concerning something more than merely property. Art came to be seen as the most special type of property, reflecting the special relationship between author and work. Copyright came to reflect the most important facets of our individuality; the parental relationship, a quest for immortality, and a life assurance policy. One of the most important features of Romanticism, the doctrine of originality, offered a way of judging the artistic worth of a work but also created a method of determining the copyrightability of a work. Another important feature – the idea of time being the only true judge of artistic worth – suggests that copyright needs to be a long period to do justice to great artists.

I have suggested some ways in which Romanticism came to develop into the hegemonic understanding of artistic creation. One reason which should not go unnoted is that, in the main, it suits the needs of publishers, as I shall detail in the chapter 6. While Romanticism may some times work against individual publishers, as the publishing industries have capitalised they have come to lean on the ideology of the Romantic author more and more. It is my argument that an understanding of Romanticism is critical for an understanding of modern copyright law.

Chapter 3

Challenges to the Romantic-centred approach

The Romantic author provides a transcendent image which offers an apparent reconciliation of the rights of artist, public and capital. However, copyright has remained unstable for two primary reasons. Firstly, the image of the author cannot reconcile the conflictual interests in copyright, it can only offer an appearance of reconciliation. In many cases the public (and in some cases, the state acting on behalf of the public) have reacted against the diminution of their rights in copyright. Secondly, the idea of the Romantic author has taken on its own institutional autonomy.¹ Thus the conception of authorship that capital relies upon may develop in some ways against capital. Both of these points will be illustrated in the case study of bootleg records later in the thesis.

It may seem that recent trends in intellectual property regimes have gone directly against the idea of the Romantic author. The shift to trade negotiations to protect intellectual property suggests that capital has jettisoned the Romantic author and is now concerned with copyright solely as a market device. This chapter, however, argues against such a proposition. In this chapter I shall detail the arguments against the approach that I am supporting here (which I have termed ‘Romantic-centred’). In particular, I shall counter the criticisms made by Lemley and Hughes. Following this, I will examine the two main alternative explanations of copyright, economic incentive theory and Lockean labour theory. I will argue that neither has the explanatory power of the Romantic author for understanding justifications and trends within copyright and, furthermore, both contain presuppositions concerning the Romantic artist. To further support the claims I am making, I shall offer evidence of how the Romantic author has become central to American copyright law, the country that was initially most unsupportive of authors. These examples will illustrate that the Romantic author is the basic assumption upon which copyright practice is founded.

¹ Indeed, Jaszi states that the author is displaying an ‘unprecedented measure of ideological autonomy.’ (1994, p.35) This refers to such developments as the adoption of moral rights by the US in compliance with Berne (the Visual Artists Rights Act 1990) and maximal moral rights protection adopted in EU harmonisation.

Criticisms of the Romantic-centred approach

The first critique of the Romantic-centred approach I shall discuss here is by Lemley (1997). In a review of Boyle (1996), Lemley offers three criticisms of an approach centred around the Romantic author. Firstly he argues that using the Romantic author cannot tell us much about the actual laws involved. Secondly, that numerous intellectual property developments are actually inimical to Romantic authors. Finally, that the Romantic author cannot explain current developments in intellectual property legislation.² Lemley's first criticism argues that the 'Romantic vision' cannot explain why copyright is in fact a limited property right. To a certain extent this is true; the 'logic' of Romanticism cannot by itself offer us a complete understanding of copyright, particularly as the 'logic' of Romanticism would result in a perpetual copyright;³ to achieve an understanding of why copyright is limited it is necessary to take into account the role of public benefit in early copyright law that I described in chapter 1. While Boyle is guilty of overlooking the role of the public in copyright legislation, I believe that his more limited thesis – that the development of copyright (and other areas of information) is based upon our presuppositions of Romanticism which leads to over-protection of authors and companies – is uncompromised by Lemley's first criticism.

Lemley's second criticism seems to pose more of a threat to the Romantic approach. He argues that certain developments in copyright are inimical to the Romantic author, arguing (correctly) that 'the rules regarding the ownership of intellectual property rights are heavily skewed to protect the interests of corporations, not individual authors and inventors.'⁴ He gives the example of 'work made for hire' and the notion of 'improvements' which I shall deal with in reverse order.

Improvement, in Lemley's terms, means the use of a pre-existing work in the creation of a new work. Here Lemley (again correctly) argues that current copyright legislation is likely to over-protect the first creator at the expense of the current creator. However, Lemley goes on to argue that the Romantic approach does not provide us with any way of understanding whether the 'primary' or 'secondary' author should be most protected by copyright, suggesting that we have a battle between two Romantic artists. This criticism is fallacious. Lemley does not appreciate how the notion of originality

² Lemley, 1997, p.879.

³ Jaszi states 'Had the case [*Donaldson v. Beckett*] been decided after the popularization of these [Romantic] ideas by Wordsworth, Coleridge and others, the outcome on the issue of perpetual copyright might well have been different.' (1994, p.32, fn.13)

⁴ Lemley, 1997, p.882.

leads to a temporal priority in copyright law.⁵ Ideologically, to be an original one must be seen to create without recourse to the wealth of creation that has gone before. If one is influenced by previously created work, one loses the adjective 'original'. It is this paradigm of originality that serves as copyright's foundation. Following from this, if a case arises whereby one artist challenges another over the use of their work, the challenge is one of unoriginality – 'you have taken from my work, you are not an original, you are imitative, you are not deserving of copyright protection.' This can be the case whether the defendant used the initial work consciously (as in *Rogers V Koons*, discussed below) or unconsciously.⁶ In each instance the defendant is penalised for not being as original as the first. This temporal priority is inherent in the Romantic doctrine of copyright.

The second issue may prove to be more problematic for pursuing the Romantic line of thought. 'Work made for hire', as described in chapter 1, is often used as evidence that copyright is just there to protect the interests of big business rather than authors and is the feature of Anglo-American copyright law that most incenses those from a European moral rights approach. It is certainly a significant weapon for capital in their relationship with artists. This is seen by Lemley, among others, as weakening the claims made by those arguing that the Romantic author is the central concept around which copyright is based. However, this incorrectly makes an *a priori* leap that the centrality of the Romantic author is necessarily beneficial to practising artists. There is no necessary relationship of benefit or harm. In practice, as Jaszi states, 'over the history of Anglo-American copyright, Romantic "authorship" has served the interests of publishers and other distributors remarkably well at the expense of actual artists.'⁷ If authors were a more coherent interest group with greater political power then it may be different, but the fact that they are not does not diminish the importance of Romanticism to copyright. This thesis looks at the uses and understandings of the Romantic author in copyright practices; it does not state that it serves authors very well.

There is a certain amount of practical necessity in the work for hire doctrine, particularly when applied to the film and music industries. If inalienable moral rights

⁵ Boyle does not focus upon this aspect of Romanticism in his work, instead concentrating on the undervaluation of collective 'sources' in creation. This shall be discussed below.

⁶ In 1976 George Harrison was required to pay \$587,000 damages because *My Sweet Lord* plagiarised the 1963 Chiffons' hit *She's So Fine* (composed by Ronald Mack). The judge in the case stated that he did not believe that Harrison had deliberately used the Chiffons' hit but as he had been aware of the song previously, Judge Owen concluded 'his subconscious knew it had already worked in a song his conscious mind did not remember.' (420 F.Supp. 177.) This subconscious appropriation is classed as infringement under copyright law.

⁷ Jaszi, 1994, p.34.

were granted to everyone who worked on the production of a film, then any one of them could theoretically prevent the distribution of that film if they felt their right of integrity had been violated. Edelman (1979) details how this aspect of film production created great problems for the French copyright system. There does seem to be an apparent contradiction, however, in a company using the rationale of the Romantic author to justify owning the copyright itself. Yet the ideology used is precisely that of Romantic creativity. When cases disputing ownership of copyright of photography and film first arose in France, the UK and US, the justification of employers was that they had provided the creative impetus for the production of a new work. Without their guidance, so the argument went, the artist would not have made anything. The ideological logic of work for hire is that ‘the visionary component of Romantic authorship [i.e. the creative impulse] had been disaggregated from the associated element of intellectual and physical labor, and privileged over it.’⁸ Edelman neatly aphorises by saying ‘the true creative subject is capital.’⁹ Work for hire is the elision of capital and Romanticism.

Lemley’s final criticism against the Romantic author being central in copyright is that it cannot explain the continuing trend for increasing intellectual property protection. Lemley argues that there is nothing in the theory of Romantic authorship to explain why copyright should change over time at all; ‘does the creation of works like musical compositions suddenly acquire the trappings of authorship (thus triggering copyright protection) coincidentally at around the time the copying of such works becomes easy?’¹⁰ Again, Lemley misses the point that the Romantic author is a rhetorical device. I do not wish to pursue the argument here, but Lemley’s criticism is precisely Edelman’s point: whenever a new creative form emerges that becomes valuable, its originators take on the trappings of the Romantic subject. Both Edelman and Gaines (1991) provide historical accounts of how photography was initially viewed as a mechanical form of production not protected by copyright. Once photography started to become more valuable however, it was soon brought under copyright protection. Photography came to be seen as a creative art and photographers became viewed as artists. This point is unnecessary for a rebuttal of Lemley’s criticism, however, for the ‘logic’ of the Romantic author would actually provide for a perpetual copyright (this is, after all, what Wordsworth was gunning for). However, as detailed in chapter 1, early copyright legislation was not legislating the Romantic author. Rather, it was a trade regulation to encourage public learning. But by deciding that the author had an absolute natural right

⁸ Jaszi, 1990, p.77.

⁹ Edelman, 1979, p.57.

in the unpublished manuscript, the *possibility* of a much greater period of copyright than the initial fourteen years was already incumbent copyright. The significance of the Romantic author in copyright has depended upon the strength of those groups with an interest in its promotion and of the weakness of and indifference of those with an interest in lessening copyright protection. As political struggles have continued in the copyright arena, if the strength of the authors and publishers is greater than the strength of the public interest, then the tendency will be for an increase in copyright. Society has not got 'more Romantic' as Lemley suggests. Rather the actors with an interest in promoting the Romantic ideology have got more powerful.

This leads onto my second point, and highlights the weakness of Lemley's overall approach. The Romantic author is a socially constructed ideology which relates to a number of other socially constructed ideologies such as individuality and property. It would be remarkable if this social construction had remained static over the last two hundred years. Instead it has changed over time, reflecting changing notions of our individuality and new productive techniques for cultural works. To suggest otherwise, as Lemley is doing, is to reify the concept of the Romantic author into a transcendent concept precisely the opposite of what Boyle, Woodmansee *et al* are trying to achieve. The focus of this thesis is not how a static conception of the Romantic author has 'led to' our current copyright situation. *Rather it is to analyse how the conception of the Romantic author has been developed and manipulated over time as the result of concrete historical processes.*

Lemley's alternative argument is that current developments in intellectual property are the result of 'propertization'. He argues that recent decisions go against the author paradigm, instead being 'perfectly consistent with the view that information is property and somebody should own it.'¹¹ Copyright is not fortified by authors' rights but rather by the short term economic interests of big companies. It is impossible to argue with the previous sentence, but to rely on it misses the point. Although the term 'intellectual property' is quite recent, the rhetoric of property has been part of the debate about literary *property* since the introduction of the printing press. The problems for publishers, and now media conglomerates, is that the rhetoric of property alone is not sufficient to gain significant property rights in immaterial goods. Instead, they needed a rhetorical springboard on which to base their claims – this was the Romantic author. Donaldson and Beckett may have gone to the House of Lords in 1774 because of short

¹⁰ Lemley, 1997, p.886.

¹¹ Ibid., p.900.

term economic interests but their arguments were based upon the rights of authors. When the record industry sought to add twenty years to American copyright law in 1997, why did they send songwriters to make a statement and not Seagram's chief financial analyst? The rhetoric of property may explain why capital seeks to extend intellectual property protection at every turn, but it cannot explain why legislators (and, very often, the public) are so convinced by their petitions. This explanation requires an understanding of the importance of the Romantic author to the moral and ideological aspects of copyright.

The final critique I shall mention here is that of Justin Hughes (1998). Hughes spends much time criticising those who highlight the centrality of the Romantic author (whom he labels pejoratively as 'deconstructionists') and accuses them of reifying the concept of authorship. This is the first aporia of his account – he accuses of reification those he also accuses of seeking to 'deconstruct' such a reification. However, as an alternative to Romantic centred theories, Hughes goes on to describe a 'personality interest' in intellectual property creations that epitomises those features of Romanticism I have highlighted, and which he is supposedly criticising. It seems that Hughes is arguing from the opposition benches. He frames the personality interest in three ways: creativity; intentionality; and identification with the created object. These are all consistent with the model of Romanticism that I have been discussing. The problem of his account is that he uncritically accepts common sense assumptions of these notions without looking at their historical development (as the 'deconstructionists' have). He can thus state 'instead of being a historical accident, there is good reason to think that the linkage between creativity, originality, and personal expression is both historically rooted and, at a deeper level, inevitable.'¹² In an attempt to critique a focus on the reliance of Romanticism in copyright scholarship, he merely succeeds in reinforcing the stereotypes that are being challenged.

Alternative explanations for copyright

It has thus been shown that the critiques of an approach stressing the importance of the Romantic author to copyright are flawed. In this section, I will look at two

¹² 1998, p.90. It must be questioned what understanding Hughes has taken of the Romantic artist when he uses the following as an argument against Romanticism 'although creativity bears some aspects of "a distinct and privileged category of activity," it has over the decades actually required dilution of the romantic notion of creative genius and, in its place, put increasing emphasis on originality and personal expression.' (p.99) I am unsure what he means by genius if it is unrelated to originality and personal expression.

alternative conceptualisations that could perhaps offer a conclusive rationale for copyright: economic incentive theory and Lockean labour theory. The first alternative I shall discuss here is the economic incentive approach. From this perspective, copyright is an economic mechanism designed to maximise allocative efficiency and thus social wealth. The reason that such a mechanism is necessary is because the type of product protected by copyright is a 'public good'. A public good is a good for which the initial costs of production are high but the costs of copying such a good are relatively low. If left unregulated, it is argued, then no-one would have an incentive to produce anything, instead waiting until another had done the legwork and then copying the product.¹³ This was the problem in the case *International News Service v Associated Press*.¹⁴ Associated Press (AP) ran a news gathering service which was utilised in printing AP newspapers. However, International News Service ran a less extensive news gathering service, preferring instead to take news from AP bulletin boards and off the pages of AP newspapers, utilising the time difference between East and West coast America. Without some form of protection, AP would be forced to lessen its news gathering service as its competitors could obtain less marginal costs than themselves and they would thus be disadvantaged. Thus no one would be willing to gather news without some guarantee that their competitors could not just free ride on their efforts and undercut their prices. From this perspective, therefore, copyright is seen as a necessary intervention by the state in order to provide an incentive for individuals to produce goods that they would otherwise not. Thus, in the creative industries, the state has to guarantee copyright to ensure the dissemination of creative works.

At the end of chapter 1, I argued that copyright was a trade regulation to ensure the dissemination of works by protecting rights of copy for a limited time. I would therefore partly endorse the economic incentive argument in copyright. However, I say partly because I believe that utilising *only* this argument offers us a very limited picture of copyright. The first reason it is partial is that both proponents and critics of the incentive approach focus on copyright as an incentive for authors to create new works. This is misleading. It is misleading firstly because there would probably still be a general level of creativity in society regardless of whether copyright protection was available.¹⁵

¹³ Landes and Posner, 1989, p.326.

¹⁴ 248 US 215 (1918).

¹⁵ I am not arguing here for a romanticised notion of the artist who does not care for material wealth. While it would make life easier if they did not, artists still have to eat, and artists will generally need to ensure that they can maintain a standard of living from their creativity that they could in another area of labour. However, I believe that an artistic desire to communicate would result in some work

To support the incentive theory it is, however, probably indisputable that overall levels of creativity would increase if copyright protection went from none to some, ensuring the viability of making a living out of creative work, but this does not mean that social levels of creativity would be nil if there was no form of copy protection. The second reason that understanding copyright as an incentive for creativity is misleading, however, is that copyright, as I argued in the first chapter, is chiefly aimed at protecting publishers rather than artists. It is publishers who need to ensure a return on their investment and copyright was initially a reward for publication, not creation. Understanding copyright as an incentive to creation misses out the actors most susceptible to economic incentives.

But, for a moment, let us cautiously accept an incentive based theory. Doing so, however, does not tell us as much as we need to know about copyright in either theory or practice. Firstly, an obvious point (though it is often overlooked): although it may be true that some copyright protection increases the likelihood that individuals will enter the creative industries, there is no direct correlative relationship between the amount of copyright protection available and the amount of work created/disseminated. So while there may be a very large increase in the overall creative output of a society by increasing copyright protection from nothing to a short term of protection (the fourteen years, say, of the Statute of Anne), there is no *a priori* leap that suggests a doubling of the copyright term will result in a doubling of creative output. This is obviously empirically unverifiable, but my guess is that even a doubling of protection from fourteen to 28 years did not result in a doubling of creative output. Boyle cites a study of patent protection and innovation in drugs companies between 1950 and 1989, which suggests a correlation of only 0.15 between patent protection and drug development in developing countries, undermining claims that a strong intellectual property regime is necessary to stimulate innovation.¹⁶

It is difficult for incentive theory to account for the expansion of copyright protection at current levels, in terms of both the length and breadth of protection. The increase in protection from the life of the author plus fifty years to a seventy year *post mortem* term, as has happened recently in both the UK and US is, at the very least, empirically untestable whether it will increase creative activity. It is dubious whether an individual or a company that had decided not to enter the creative market with the prior

being created even if there was no copyright protection available. This is of course unverifiable speculation.

¹⁶ Pablo Challú *et al.*, (1991), 'The consequences of pharmaceutical product patenting', *World Competition* 65 p.115. Cited in Boyle, 1996, p.43.

term would be tempted to enter once promised an extra twenty years of protection sometime in the middle of the twenty-first century. And it is certainly the case that offering a retroactive extension of protection does not increase incentive: increasing the term of copyright protection cannot stimulate someone to create a work they have already made. As Sterk states:

Although some copyright protection indeed may be necessary to induce creative activity, copyright doctrine now extends well beyond the contours of the instrumental justification. The 1976 [US] statute and more recent amendments protect authors even when no plausible argument can be made that protection will enhance the incentive for authors to create.¹⁷

Increasing protection may actually prove to be economically irrational as it increases the cost of creating new works by fencing off some of the public domain (which authors use when creating new works) as private property. In this case, a strong and long term of copyright is a disincentive for new creators. Take as an example, a novel that had been written in 1930 and whose author had died in 1951. If a publisher had been waiting to reprint this book (which had long since stopped being published) in 2001, he is now prohibited from reprinting the book until 2021.¹⁸ It is not only publishers who suffer in this instance; if an author wanted to use a poem from Robert Frost's *New Hampshire* book of poems (the copyright of which, when the author wrote them, was due to expire in 1979) she will now have to wait a further twenty years before she can do so, or risk copyright infringement. It is difficult to see what incentive the earlier authors gained from the extension of copyright in these instances, particularly Robert Frost, who died in 1963. Not only is there not a directly proportional relationship between copyright protection and creative output, the link will eventually become a negative one as the protection offered old creators results in a prohibitive burden on new creators. Similarly, incentive theory does not offer an adequate answer as to why copyright offers such breadth of protection. Even if an author should be granted a long period of protection for a work, why should that protection extend to translations, abridgements, stage adaptations and screenplays? If the work already exists, it is not necessary to offer a further incentive. One final important point is that economic incentive theory cannot

¹⁷ Sterk, 1996, p.1197. See also Dixon, 1996.

¹⁸ This is the case of Eldritch Press where Eric Eldred runs a website dedicated to offering digitised versions of old books, and Sinister Video, a small mail order company that specialises in selling out of copyright old films. See Walker, 2000.

explain the basic requirement for copyright protection: originality. Originality has no basis in economic incentive theory. In fact, an originality requirement may prove a disincentive to creators as occurs in the *Feist* case discussed below.

What we find is that copyright practitioners are not able to rely wholly upon the idea of incentive to justify the copyright regime. Sterk highlights that when incentive arguments are insufficient, both judges and those seeking copyright extension rely on a theory of just deserts. This moral element to the justification of copyright will prove important to my argument. The decision of the US Supreme Court in *Mazer v Stein* exemplifies this process. Its judgement stated:

The economic philosophy behind the clause empowering Congress to grant patents and copyrights is the conviction that encouragement of individual effort by personal gain is the best way to advance public welfare through the talents of authors and inventors...Sacrificial days devoted to such creative activities deserve rewards commensurate with the services rendered.¹⁹

As economic incentive theory proves insufficient ('the economic philosophy...'), legislators and judges move to offer moral justifications for copyright ('sacrificial days...'). This is sometimes couched in terms of Lockean labour theory but, as I argue below, this is also insufficient in explaining copyright. Instead, practitioners rely on the basic assumptions about Romantic authorship. As Boyle states 'contemporary economic analysis conceals these tensions, aporias, and empirically unverifiable assumptions by relying unconsciously on the notion of the romantic author.'²⁰

To sum up this brief overview of economic justifications of copyright, economic incentive is still one of the major reasons given for (increasing) copyright protection. However, while incentive may be necessary to ensure some level of creativity, the incentive theory cannot explain the increasing scope (both of length and breadth) of copyright, nor requirements for originality. When economic justifications fail, copyright practitioners rely upon moral justifications for increasing protection. Both these moral justifications and the economic assumptions of creativity rely upon notions of the Romantic author.

¹⁹ 347 U.S. 201 (1954), quoted in Hughes, 1988, p.303.

²⁰ 1996, p.42.

The second possible justification of literary property is natural law theory, based on a Lockean understanding of property. Both authors and publishers have, at certain times, used natural law arguments to defend a perpetual and strong copyright. However, although his work is often utilised by those most desiring to extend private ownership into all realms of society, Locke also identified limits to private property. If we are to use a Lockean justification of copyright, then copyright should adhere to these limitations. However, these limitations are often transgressed by intellectual property regimes and some of these transgressions are inherent in the nature of copyright itself. Thus Lockean labour theory does not provide an adequate justification of copyright.

Locke starts from the premise that each individual has the property of one's own body. All external items are held in common as a grace from God. However, Locke argues that land held in common cannot be tilled as efficiently as if it was owned privately and so he sanctions the private appropriation of common land for the sake of efficiency. This private acquisition occurs through the individual mixing his or her labour with the common property. Becker argues that this conceptualisation of property does not explain why the mingling of one's labour with common property should result in the private appropriation of the object rather than the ceding of one's labour to the commonly owned property: why does mixing one's labour with property result in private wealth rather than social wealth?²¹ The answer to this is partly the need for incentive, as described above, and partly in the conditions that Locke placed upon private appropriation. Firstly, there is the 'value-added' provision: Locke states that the labour mixed with the property increases the value of the property and the labourer deserves some reward for this. It is thus a just deserts theory. As Hughes describes it, 'the "labor-desert" theory asserts that labor often creates social value, and it is this production of social value that "deserves" reward, not the labour that produced it.'²² The creation of social value is thus necessary to be rewarded by property. The second limitation is that there must always remain 'enough and as good left in the common for others.' Private property is allowed only if there is sufficient common property left over for others to enjoy. With regard to copyright, this limitation means that although some creative work becomes fenced off as private property, there must always be a sufficient pool of ideas and expressions for other authors to utilise. The third limitation Locke places on property is the non-waste principle. Locke argues that an individual should never be able to

²¹ 1977, p.34.

²² 1988, p.305.

appropriate so much property that some of his property becomes useless before it has been used.

Locke's writings on property were primarily concerned with property in land. The lack of similarity between land and creative works has been commented upon both by proponents of strong copyright law (such as Wordsworth and Diderot) and by those who argue that we cannot use natural rights theory to sustain a perpetual copyright (such as Condorcet). Let us assume for the moment that land and literary property are analogous. If we wish to use Lockean theory as the basis of our understanding of copyright we must still prove that intellectual property adheres to the limitations set out by Locke.²³ In this section, I shall argue that there exists no such adherence.

Even if we were to go on to prove the validity of Lockean labour theory as a justification for copyright, however, Boyle points out that it would still prove insufficient as the sole explanation of copyright and we would still need the notion of the Romantic author as a crutch. Boyle argues that Lockean labour theory cannot explain why, in our current social constellation, these property rights should be available only to artists rather than to an assembly line worker, or someone who sews footballs together. Boyle states that Romanticism

...circumscribes the ambit of a labour theory of property. At times, it seems that the argument is almost like Locke's labor theory; one gains property by mixing one's labour with an object. But where Locke's theory, if applied to a modern economy, might have a disturbingly socialist ring to it, [Romanticism] bases the property right on the originality of every spirit as expressed through words. Every author gets the right - the writer of the *roman à clef* as well as Goethe - but because of the concentration on originality of expression, the residual property right is only for the workers of the word and the image, not the workers of the world. Even after that right is extended by analogy to sculpture and painting, software and music, it will still have an attractively circumscribed domain.²⁴

We need a further explanation to justify why artists should not be wage labourers, and why they should be given a special kind of property. This justification lies in the

²³ I am assuming here that the production of artist works involves the act of labour, a point somewhat laboriously stated by Hughes, 1988, pp.300-305.

²⁴ Boyle, 1996, p.57.

Romantic ideology – how could we possibly expect a genius to be a mere wage labourer?

But this is only if we accept a Lockean labour theory as the basis of copyright. If this is the case, it needs to satisfy three criteria: that the work that it protects adds to overall social value; secondly, that offering copyright protection does not create waste; finally, that copyright protection ensures that there will still be ‘enough and as good’ remaining in the cultural commons.

There is an assumption underpinning discourse on creativity which suggests that each new creative work offers an increase in overall social utility. However, though it may not be the popular interpretation in the ‘information age’, it is conceivable that too much information may actually result in social disutility. The internet is a prime example here. The internet has resulted in a huge expansion of available works, all of it potentially copyrightable. Much of it has a minimal (perhaps even negative) aesthetic worth. But there is more than an aesthetic element to this disutility: the huge expansion of the internet has resulted in the technical capacity of the internet’s structure being compromised to the point where internet access is much slower than five years ago. Rather than adding social value, this expansion of information has had a negative impact on society’s technical capacities. Hughes points to the possible situation where we have more information than we as a society can compute, leading to social disutility. Copyright law contains no inherent ‘value added’ criteria for protection. A work does not have to have social value to be eligible for protection. As Hughes points out ‘bad poetry, box office failures, and redundant scholarly articles are not denied copyright protection because they are worthless or, arguably, a net loss to society.’²⁵ Nesbitt (1987) makes the argument that the first thing copyright does is flatten all aesthetic worth: all creative works are now deemed equally worthy of protection. This all relies on subjective judgement, however. More significantly, authors can even obtain copyright protection having no intention of ever publishing the work, thus offering no social value. This was initially not the case, but such a policy is inherent in a copyright that is understood to be based on the Romantic author. Copyright thus fails to meet Locke’s condition that private appropriation of the commons should result in an increase in social value as it is a system that enable authors to appropriate from the commons without adding to social value.

The second condition that copyright has to meet is that an individual should not be able to appropriate so much common stock that its usefulness expires without ever

²⁵ 1988, p.309.

having been used, as this would be wasteful. The extensiveness of copyright protection means that it fails to fulfil this criteria also. The example of Eldritch press above illustrates that there are a huge number of works currently under copyright protection that will not be published again but would prove useful for a number of fans, secondary creators or small publishers. Bootlegging provides a good example here: Dylan's *The Basement Tapes* (which shall make repeated appearances in this thesis) were an amalgam of traditional tunes and some original material. A small amount of this material featured on the first bootleg album and was subsequently officially released. This comprised only a very small percentage of the recorded output, however. The remaining recordings were left to rot in a damp locker in Woodstock. In 1991, a bootlegger managed to buy tapes of some of these reels, but there still remains about eight reels of tape which have not yet been recovered, and continue to disintegrate. These works may be some of the most important in popular music in the last fifty years and are certainly of interest to collectors and potential small publishers (bootleggers). They also owe a huge debt to the common songs of the public domain. But the private appropriation of these works (Dylan has disregarded them and Columbia Records refuses to either release them or even protect the original reel to reels) for such a long period of time leaves many of them to stagnate.

This example, and Dylan's debt to traditional music, leads onto the final issue; that of the commons (the 'enough and as good' principle). Within copyright discourse, the commons has a specific name - the public domain. The fate of the public domain is one of the most serious issues caused by current copyright legislation, and I shall discuss it in more detail later in the next chapter. In this section, though, I shall outline the theoretical issues that the question of the commons raises.

Proponents of the current system of copyright argue that there is no more appropriate example of what Locke meant by the commons than public domain (the cultural commons). Even though individuals gain private property from their intellectual labour, it is argued that the pool of ideas available for other users continues to grow rather than diminish. This is because copyright contains a mechanism that enables the private appropriation of cultural works while adding to, rather than diminishing, the cultural commons. This is the idea/expression dichotomy, one of the keystones of copyright law worldwide. This is the main way that copyright seeks to solve the contradiction between the public and capital. The idea/expression dichotomy tends to be

attributed to Fichte in his work *Proof of the Illegality of Reprinting*, though it was actually conceptualised prior to Fichte by Lord Chancellor Hardwicke in *Pope v Curl*.²⁶

Fichte's conceptualisation came at the end of the twenty year 'debate over the book' in Germany in the late eighteenth century. It forms the basis of the answer to the questions 'what is the form of literary property; what is actually protected by copyright?' that forms the central issue in debates concerning literary property. Opponents of authorial property argued that if the thing protected was the book, then ownership passed to the buyer on purchase, to read, lend or copy as she pleased. Fichte's solution was to split the work into its material and immaterial forms. This resulted in three distinct property shares in the book: the physical object is owned by the buyer; the ideas that the book contains become a shared property; but the form in which these ideas have been presented remain the eternal property of the author. Fichte explains this in the following terms:

each individual has his own thought processes, his own way of forming concepts and connecting them.... All that we think we must think according to the analogy of our other habits of thought; and solely through reworking new thoughts after the analogy of our habitual thought processes do we make them our own. Without this they remain something foreign in our minds which connects with nothing and affects nothing. ... Now, since pure ideas without sensible images cannot be thought, even less are they capable of presentation to others. Hence, each writer must give his thoughts a certain form, and he can give them no other form than his own because he has no other. But neither can he be willing to hand over this form in making his thoughts public, for no one can appropriate his thoughts without thereby altering their form. This latter thus remains forever his exclusive property.²⁷

The idea/expression dichotomy offers an apparent resolution to the problem of the clash of interests at the heart of copyright. Copyright protects the expression of a work, not its underlying ideas, which are free for anyone to use. These ideas thus expand the cultural commons. A useful example here may be the academic sense of plagiarism. Academic works borrow the arguments of previous works and build on them. This is standard academic practice. However, were one scholar to copy the words by which another had

²⁶ Rose, 1993, p.131.

²⁷ Quoted in Woodmansee, 1994, pp.51-52.

elucidated an argument, then she would be accused of plagiarism as she has taken the first scholar's expression, rather than merely the ideas. Elton John owns the copyright to *Candle in the Wind*. He does not own the copyright to the idea of a love song, or even the idea of songs memorialising dead blondes. Through this mechanism, both the public and the author are seen to benefit: the author gains the copyright to the expression of her work while the public gains the new ideas through an ever expanding public domain.

The problem of the idea/expression dichotomy is its practical value, which is very nearly nil. The concept is so abstract as to be virtually worthless as a practical tool for deciding copyright cases. In 1930, US Judge Learned Hand commented that the distinction was an impossible abstraction:

Upon any work, and especially upon a play, a great number of patterns of increasing generality will fit equally well as more and more of the incident is left out. The last may perhaps be no more than the most general statement of what the play is about, and at times might consist of only its title; but there is a point in this series of abstractions where they are no longer protected, since otherwise the playwright could prevent the use of his 'ideas', to which, apart from their expression, his property is never extended. Nobody has ever been able to fix that boundary, and nobody ever can.²⁸

Furthermore, the idea/expression dichotomy grew out of Romantic discourse of individuality and originality. It thus contains assumptions about creativity that tend to lead to judges erring on the side of the artist when trying to draw a line between idea and expression. The problem is the Romantic understanding of individualised creation. As I shall argue in the last section of this chapter, a conception of the author pulling a work out of nothing is unrealistic. Creation is instead a process of patching together previous influences. As Northrop Frye famously phrased it: 'poetry can only be made out of other poems; novels out of other novels....All of this was much clearer before the assimilation of literature to private enterprise'.²⁹ Thus each time a new work is created, the author utilises part of the commons in order to create. However, the ideology of Romanticism is of organic creation springing from the mind of the creator, so as Paul Goldstein says, 'copyright is about sustaining the conditions of creativity that enable an individual to

²⁸ *Nichols v Universal Pictures corp*. Quoted in Frow, 1988, p.7.

²⁹ 1971, p.97.

craft out of thin air an *Appalachian Spring*, a *Sun Also Rises*, a *Citizen Kane*.³⁰ If this understanding of creation is accepted then the author has no debt to the intellectual commons, and can thus claim their work as private property. Copyright protects only original works, after all. The problem of this is that the commons actually shrinks because of it. Let us return to Dylan as an example. Dylan's early songs regularly took either the words or melody from early folk and blues songs. For example, *A Hard Rain's A-Gonna Fall* was based on the melody of *Lord Randell*, and *Girl From the North Country* on *Scarborough Fair*. However, Dylan was able to copyright these songs as his own, original, work.³¹ The melody for *Lord Randell*, which was in the public domain, has been privately appropriated and, should Dylan or his record company wish, they could sue anyone recording the folk song. If one accepts the Romantic ideology then Dylan has created the song out of thin air and there can be no infringement of the commons and there is no reason to suggest that a private appropriation of public property has taken place. Thus copyright, even though it contains mechanisms supposedly to protect the commons, still finds itself reliant upon Romantic ideals of authorship and thus does not fulfil Locke's limitation on property: there is not 'enough and as good' left in the cultural commons once private appropriation has taken place. As detailed below, there has been a marked shrinkage in the cultural commons.

So although both economic incentive and Lockean labour theory may offer insights into copyright, they are in themselves incomplete as bases for understanding copyright. Both theories make assumptions based upon a Romantic vision of creativity to answer questions posed by the everyday copyright practice. In the final section of this chapter, I will now provide some examples of how the Romantic author has become central to American copyright law over the last 25 years.

Romanticism in practice: the Romantic author in US copyright

The United States did not accede to the Berne Convention until 1989, 108 years after its conception.³² The main reason it had not joined until this point had been that US

³⁰ Quoted in Boyle, 1996, p.57. Boyle's (and my) emphasis.

³¹ This is still Dylan's practice today. On his 1992 album *Good as I been to you*, he recorded a version of an old folk song *Jim Jones* which had been arranged by Mick Slocum. The recording is copyrighted traditional, arranged by Dylan.

³² In 1891 the US passed the Chace Act, which granted copyright protection to foreign nationals of countries with which the US had signed a bilateral agreement. This was the first protection of foreign authors in American copyright.

copyright had required registration and the placement of a copyright notice on the work for copyright protection, something Berne explicitly forbade. America's accession to Berne, however, can be seen as part of a wider development in American copyright law that, as with the other countries studied here, centralised the author in copyright. This has accelerated in the last 25 years, beginning with the 1976 copyright act although Patterson notes that even before that point US lower courts had continually made copyright judgements contrary to both the copyright act and the copyright clause based on the assumption that copyright is based on the natural rights of the artist.³³

Before 1976 American copyright law had been extended twice, each time maintaining the centrality of public benefit to American copyright. In 1831, Congress extended the first period of copyright protection to 28 years, with a fourteen year renewal term for surviving authors. In 1909, despite intense lobbying from authors to adopt a life plus fifty years period of protection, Congress refused to adopt a term of protection based on the author's lifetime as it was contrary to the stated aims of US copyright.³⁴ The report of Congress accompanying the 1909 act stated that it is 'not primarily for the benefit of the author, but primarily for the benefit of the public, that such rights are given.'³⁵

The 1976 act transformed the period of copyright protection (which had been extended to 28 years plus a 28 year renewal for a living author in 1909) from a fixed term to the life of the author plus fifty years. It also ended the requirement for registration of copyrighted works, thus making copyright the reward of creation rather than publication.³⁶ Copyrights in already existing works were also given an extended period of protection, the renewal period being extended to 47 years, thus creating a full protection period of 75 years. The 1976 act fundamentally changed the nature of US copyright law.³⁷ From 1790 until 1977, US copyright depended upon two facts 1) a new writing and 2) the publication of that writing. The 1976 act eliminated the requirement of publication, and extended protection for already existing writings.³⁸

America's accession to Berne necessitated the introduction of moral rights into US law, a category that has always been viewed with distaste by most American jurists

³³ Patterson, 1993, p.4.

³⁴ Dixon, 1996, p.957.

³⁵ Quoted in Ginsburg, 1990, p.1001.

³⁶ Although it did require the copyright notice to be placed on any copyrighted works. This was ended when the US acceded to Berne in 1989.

³⁷ Dixon, 1996, p.959. The US register of copyrights in 1976, Barbara Ringer, stated: 'the new statute makes a number of fundamental changes in the American copyright system, including some so profound that they may mark a shift in direction for the very philosophy of copyright itself.' Quoted in Litman, 1987, p.859.

as they view it as incompatible with a copyright regime motivated by public learning.³⁹ As it would have been very difficult to pass moral rights legislation against a reluctant entertainment (particularly film) industry, and would have necessitated the withdrawal of the work for hire scheme, the US government pulled a sleight of hand over moral rights and introduced the Visual Artists Rights Act (VARA) in 1992.⁴⁰ This granted moral rights, but only to artists working in a medium where they produced under 200 copies of a work.

In 1997, due to intense lobbying by the Disney corporation, a bill was introduced in Congress to extend the period of copyright protection to the life of the author plus seventy years. This would (coincidentally) extend the period of protection for works by corporate authors by a further twenty years, with the result that Mickey Mouse would not enter the public domain in 2003 as originally expected.⁴¹ The two chief arguments put forward in support of the bill were, firstly, that it would bring the US into line with the international standard and, secondly, that copyright was intended to provide for the author and two generations of heirs.⁴² In support of the bill, the Recording Industry Association of America (RIAA) produced statements from a large number of songwriters arguing that their heirs were not adequately protected. Despite lobbying from many American academics arguing that copyright was being fundamentally altered from its origins, the bill became law in 1998. Such has been the change in the understanding of American copyright law in recent years that the man who drafted the copyright extension act, Senator Hatch, can state without hint of irony, 'through this process, [the 1976 act] the historic principle of the author as the foundation and focus of our copyright system was reaffirmed.'⁴³

³⁸ Patterson, 1993, p.17. The 1976 act came into effect 1/1/78

³⁹ e.g. Lavigne, 1996, p.338.

⁴⁰ 17 USC 101-650

⁴¹ See 'Disney lobbying for copyright extension no Mickey Mouse effort', Chicago Tribune 17 October 1998. Found at <http://www.public.asu.edu/~dkarjala/commentary/ChiTrib10-17-98.html> (visited 2/11/00)

⁴² Hatch, 1998, p.732. This supports the arguments made in chapter 2 regarding the importance of inheritance and the family to Romantic ideas of copyright. Lavigne, however, states that nowhere in the history of US copyright law has the rationale that copyright is to benefit the author's heirs ever been utilised. This is unsurprising given US copyright's historical favouring of the public interest. It was used in the justification for extending the period of copyright during EC harmonisation, however: 'Whereas the minimum term of protection laid down by the Berne Convention, namely the life of the author and 50 years after his death, was intended to provide protection for the author and the first two generations of his descendants; whereas the average lifespan in the Community has grown longer, to the point where this term is no longer sufficient to cover two generations' (EC Council Directive 93/98, 1993 O.J. (L 290) pmb1. s 5) Quoted in Lavigne, 1996, p.437.

⁴³ Hatch, 1998, p.740. And as the US started out with the most idealistic of the copyright regimes that we have discussed here, it is little surprise that it is here that there has been a more active group of writers who voice concern that the ideals of American copyright have been distorted (for example Dixon 1996, Lavigne 1996, Patterson 1993).

The ‘romanticising’ of US copyright has thus accelerated greatly in the last quarter of a century. I shall now give details of two recent US cases that show how such Romantic attitudes are promulgated in the day to day activities of courtrooms.⁴⁴ In *Feist Publications V Rural Telephone Service Company* the case depended upon whether a telephone directory was eligible for copyright protection.⁴⁵ Feist had been refused a licence by RTS to use the contents of their ‘White Pages’ directory in Feist’s own directory, which covered a wider geographical area than RTS’. Feist went ahead anyway and RTS sued for copyright infringement. The substantive issue in the case was whether an alphabetically arranged list could be protected. Most commentators thought that some degree of protection would be granted to protect the labour of collecting the information (the ‘sweat of the brow’ thesis, which follows the idea of just deserts in both natural law and economic incentive theory).⁴⁶ The Supreme Court, however, found in favour of Feist. While this outcome may be laudable to those concerned about increasing copyright appropriation, the argument of the Supreme Court is concerning, for it is based *solely* in terms of originality and creativity. Indeed, as far as the Supreme Court is concerned, creativity is presupposed by the term ‘originality’, stating ‘original, as the term is used in copyright, means only that the work was independently created by the author (as opposed to copied from other works), and that it possesses at least some minimum degree of creativity.’ When classifying what may count as ‘writings’ for US copyright law, Justice O’Connor quotes approvingly from an earlier case which states ‘it is only such as are *original*, and are founded in the creative powers of the mind. The writings which are protected are the *fruits of intellectual labour*.’⁴⁷ The Court explicitly rejected the sweat of the brow doctrine stating that it ‘flouted basic copyright principles’ and thus concluding that ‘Rural expended sufficient effort to make the white pages directory useful, but insufficient creativity to make it original.’ This justification is extremely significant, for it goes against incentive based justifications of copyright. Instead, for a work to be protectable, it must be original and creative. This is extremely Romantic.⁴⁸

The second case provides a good example of judicial hostility to those who do not fit the stereotype of the Romantic artist (and provides a certain amount of irony given that the ‘artist’ is the one that loses the case to a commercial photographer). In

⁴⁴ The choice of these particular cases is not original, and they are used by many copyright scholars as exemplars of Romantic rhetoric. For example see Jaszi, 1994 and Aoki, 1996.

⁴⁵ (1991) 499 US 340.

⁴⁶ Jaszi, 1994, p.36.

⁴⁷ Emphasis in original.

⁴⁸ For more on the Feist case, see also Ginsburg, 1991, pp.56-58.

response to Lemley's critique, it also provides evidence of the issue of temporal priority created by Romanticism,. In *Rogers V Koons*, photographer Art Rogers had photographed a couple holding a litter of puppies which had been published in his newspaper photography column.⁴⁹ Jeff Koons saw the picture and decided it was an appropriate basis for an item in his forthcoming 'banality show'.⁵⁰ Koons often employs a division of labour in artistic production and in this instance he used a studio in Italy to produce a large three dimensional wooden sculpture of the scene, which was painted bright orange. Rogers sued for infringement of his image. While the court did find for Rogers, what is more interesting is the attitude of the judgement toward the two competing artists.⁵¹ In the judgement, Romantic assumptions concerning individual creation and the opposition of art and commerce abound. Like Warhol before him, Koons actively seeks the communion of art and money. This did not do him any favours in court. Judge Cardamone highlighted 'while pursuing his career as an artist, he also worked until 1984 as a mutual funds salesman, a registered commodities salesman and broker, and a commodities futures broker'⁵² and suggested that Koons tactics were 'so deliberate as to suggest that defendants resolved so long as they were significant players in the art business, and the copies they produced bettered the price of the copied work by a thousand to one, their piracy of a less well-known artist's work would escape being sullied by an accusation of plagiarism.' Rogers is presented as an 'artist-photographer' whose art and life are well balanced, having 'a studio and home at Point Reyes, California.' This once again illustrates the collusion of Romantic notions of art and the family.

Koons' working methods also went against him. In a style reminiscent of Michaelangelo, Koons used a studio of artisans to create works under his supervision. Rogers took the photographs himself. Koons' mode of work goes against the ideal of the Romantic author who creates work individually, even though it may be a more conventional way of producing art. However, the general antipathy to both Koons' working practices and his elision of art and commerce come together in the following

⁴⁹ (1992) 960 F.2d 301.

⁵⁰ Koons is a famous artist who specialises in 'appropriation art.' Appropriation art is akin to sampling in music. It involves the taking of found images and placing them in new artistic contexts. As this type of art involves the appropriation of another work (which is usually protected by copyright), it is in one sense making the creative process explicit and has created numerous problems for copyright law.

⁵¹ Koons' chief defence was that his work was parodic and thus permissible under fair use (he fully accepted that he had taken the image) which the judge dismissed on the basis that works of parody can only parody an individual work and not society as a whole, as the banality show claimed.

⁵² Presumably judge Cardamone would have been ill disposed to Wordsworth as an artist on the grounds that he had been a tax collector.

statements from a 1988 New York Times Review that Judge Cardamone quoted in his summary:

His art is largely strategic. Images have been appropriated from photographs of popular culture and then collaged together into spanking new commodities. They were made collectively, even anonymously, by workshops in northern Italy. What seems to matter is not the originality of the artist, but rather images that belong to an entire culture and that everyone in culture can use.⁵³

Whether or not Koons should have been found guilty of infringement is irrelevant to this example. What this case shows is that copyright is still likely to support those who most conform to the stereotype of the Romantic artist. There are strong reasons to support Boyle's statement that 'authorship is not merely a handy argument. It is a premise, the major premise, of our intellectual property system.'⁵⁴ Even though other considerations may be taken into account by copyright practitioners, the common sense assumptions made about artistic creation that underpin such judgements are loaded with Romantic ideology.

There are further reasons to suggest that the importance of the Romantic author is not about to dwindle. European harmonisation is forcing member states to increase the level of protection to match the maximalist protection of France and Germany (the life of the author plus seventy years). TRIPs legislation forces signatories to adhere to the minimum protection of the Berne convention, described by Jaszi and Woodmansee as a union to protect literature rather than a treaty.⁵⁵ When the issue of protection for computer software arose in the late seventies, software firms argued that it should be granted copyright protection (rather than the more appropriate, but lesser, patent) on the grounds of the originality of the programmers.⁵⁶ More recently, particularly in the US,

⁵³ The article goes on to compare Koons to a 'proper' Romantic artist: 'In medium, method and response to the past, however, the Koons and the Manet could not be further apart. While Manet painted his work, Koons supervised the production of the statue. While Manet was making art that he hoped would speak on equal terms with Titian and Goya, Koons makes art that he hopes can speak on equal terms with Michael Jackson.' Quite why art produced in the late nineteenth and late twentieth centuries would be similar is not questioned. Cited in Jaszi, 1994, p.43. The overview of the Koons case here stems from Jaszi, 1994.

⁵⁴ Boyle, 1996, p.158.

⁵⁵ 1996, p.956. The exemption of moral rights protection from TRIPs should be noted.

⁵⁶ Frow, 1988. See also Andrew Christie, (1994), 'Designing appropriate protection for computer programs', European Intellectual Property Review 11, pp.486-493.

there is a developing 'rights of personality' which can protect stars from lookalikes and soundalikes. These new rights stem from the same logic of the unique Romantic individual.⁵⁷

The Romantic ideology thus underpins many of the assumptions of recent developments in copyright law as well as historical ones. Romanticism does not seem about to relinquish its hold on copyright practitioners.

This chapter has given an overview of the theoretical discussions concerning the understanding of copyright that I am positing in this thesis. Firstly, it discussed critics of the argument that the Romantic author is central in copyright but rejected the criticisms, arguing that these critics tend to adopt a reified notion of Romanticism which does not give full credit to the concrete processes that are involved in copyright's history. Secondly, it offered two alternative justifications for copyright and argued that while these approaches may contain some insight toward copyright, they are by themselves incomplete and rely upon unformulated assumptions concerning the Romantic author. Finally, as evidence to support the contention that the Romantic author is a central feature of our understandings of copyright, I gave details of recent US legislative history and two recent copyright cases that illustrate the continuing importance of the Romantic author. In the next chapter, I will detail some of the problems that a Romantic understanding of creation can give rise to, and suggest some alternative ways of conceptualising both creativity and copyright which may ease some of these problems. Following this, in chapter 5, I will describe how Romantic beliefs exist in the modern setting of popular music before, in chapter 6, looking at the relationship between Romanticism, popular music and copyright.

⁵⁷ Gaines, 1991; Armstrong, 1991; Frow, 1995.

Chapter 4

Some alternative conceptualisations of creativity and their implications for copyright

*Men only end up being so different because they
began by copying and continue to do so.¹*

I have thus described how the Romantic author provides the basis for our understandings of creativity that form the foundation of copyright. The question why this is significant still remains. In the first section of this chapter, I shall detail some of the problems that are created by a Romantic understanding of creativity. Once I have described why our current situation presents a problem, I shall turn briefly to some alternative conceptions of creativity. I shall posit three theories that, while not explicitly addressing copyright, may point to useful ways in which copyright could be conceptualised. Firstly, I shall discuss Adorno's arguments on the culture industry, which posit that there can be no creativity within the culture industry. From this argument, I will question whether copyright (which is currently based upon creativity) could be reconceptualised in ways that mean protection is based upon economic criteria rather than aesthetic ones. I will then look at the work of Lucien Goldmann, who argues that all creativity is socially produced before finally detailing the argument that the meaning of a work is created by the reader of a text rather than its author. This has been a common idea within literary studies in the last twenty years but here I shall focus on Barthes' famous essay 'The death of the author'. From these latter two theories, I will draw out the implications for copyright regarding the public's role in creation and discuss how the public should be regarded in copyright in as both users and creators. If we reconceptualise the public in this way, it may be possible to provide a positive public right in copyright, in contrast to the negative public right that currently exists.

Problems caused by a Romantic centred copyright

In general, the problems created by copyright's reliance upon Romanticism can be brought under two areas. Firstly, copyright is unable to cope with modes of creativity which are not individualised. Secondly, for reasons that I will expand upon in chapter 6, the centralisation of the Romantic author means that copyright is inherently likely to

¹ Etienne Bonnot de Condillac.

favour the apparent interests of the author (which tend to be capital's interests rather than the author's) at the expense of the interests of the public. In this chapter, however, rather than concentrating on theory, I will provide concrete examples of such problems.

The first criticism put forward by critics of copyright is that all authorship is, by its nature, collaborative. Poets discuss their poems with friends as they are written, novelists' works are changed by their editor, academics obtain opinions from trusted colleagues before submitting articles; the list of acknowledgements at the beginning of a book or in a CD booklet indicate an awareness that one's work is not entirely the product of one's own industry.² Stillinger has written that even the works we may think of as exemplars of individual authorship were actually the result of collaborative practices: JS Mill's wife amended the drafts of his autobiography to make her husband appear more attractive; Keats' rough poetry in *Isabella* was polished up by helpful friends and editors; Ezra Pound altered or deleted some 400 lines of *The Waste Land*; Coleridge (the most famous plagiarist of all time?) took complete sections of work from the German Romantics without attribution.³ Wordsworth's *Daffodils*, described earlier as a paradigm of individualism, was actually a collaborative creation.⁴ Probably the most famous co-authored work in English literature – Wordsworth's and Coleridge's *Lyrical Ballads* – originally appeared anonymously but all references in the advertisement were to a singular author. When a name was attached, in the 1800, 1802 and 1805 editions, it was only that of Wordsworth (although the preface did acknowledge that 'a friend' had furnished him with several of the poems). It was not until nineteen years after its first publication that *The Rime of the Ancient Mariner* was finally accredited to Coleridge in published form.

Rock music is, of course, collaborative. Only in the most extreme circumstances would a songwriter or a producer be able to maintain complete control over the produced record (Phil Spector perhaps?). As most rock music is performed by a group of musicians, all of those musicians (as well as the producer and sound engineer) may have some input into the creation of the song. Bill Wyman, who alleges he created the riff for *Jumping Jack Flash* (copyrighted to Jagger/Richards) has continually grumbled that he

² Academics seem the group most willing to accept the practical realities of collaborative authorship. Although plagiarism is clearly unacceptable, the quoting and building upon other academics' work is the *modus operandi* of academic research. It would be interesting to see if they were willing to forgo their royalty payments, however.

³ Stillinger, 1991.

⁴ Jaszi and Woodmansee, 1996, pp.950-953.

never obtained any songwriting credit.⁵ Of the three most bootlegged acts, two contain writing partnerships (Jagger/Richards and Lennon/McCartney). On stage, live performance is by its nature collaborative – even a solo performer is working with the lighting crew and sound engineers in order to put on a performance.

The fact that composition is collaborative does not prove the death knell for copyright. In practical terms, it means that too many authors (the friends, the editors, the bass players) are overlooked by a singular copyright attribution but, theoretically, copyright could cope with this abundance of authors. They are all individuals who could own a share of the copyright (though the proportionality of such allotment would be entertaining - ‘if I play a longer solo than you, I should get more credit’, ‘how much shall we give the drummer?’). This would, however, cause a problem for capital as one of the benefits of Romanticism for industry is that it unifies copyright in one or two individuals – one the key reasons for the development of the work for hire doctrine was so that all members of a film crew (film being the most explicitly collaborative cultural production) would not have any rights in the finished product.

While copyright can conceivably deal with the principle of collaborative authorship, it has far greater problems with collective authorship. In part this relates to the ideas of Goldmann that are discussed below, but the work undertaken by copyright scholars emphasises two areas of collective authorship; the inequalities of international copyright legislation caused by a Romantic (Western) conception of copyright; and the inability of copyright to protect folklore in both a developed and developing social context.

Although copyright no longer has the requirement of registration, which was a significant factor in the international inequality in intellectual property (and still is in patenting, as will be described below), it does have the requirement of fixation. Something has to be written down, drawn, made or notated before it is eligible for copyright. This creates an obstacle for cultures that are predominantly oral. If songs are passed down from generation to generation but never written down then, then one song take on a multitude of forms as people add lines or leave out verses over time – it is impossible to think of one version of, say, *St. James Infirmary*, as the definitive song. Not only this, but the authorship of such a patchwork composition becomes lost (in reality it was never there to be found – see the discussion on blues below). In Western culture, there is a convention to solve this dilemma: *anon*. In other cultures, however,

⁵ The issue of songwriting credit has always been controversial for the Stones: part of Brian Jones’ alienation from the band was the result of the Jagger/Richards songwriting axis and his replacement,

there is no dilemma. However, as copyright becomes increasingly internationalised, developing countries and oral cultures find copyright now working against them.

This most dramatically occurs within patent and trademark laws as they are the most commercially lucrative areas of intellectual property, particularly with the development of ethnobotanical medicines. Western drugs companies have recently begun to utilise indigenous knowledge regarding the medicinal capacities of local plants. As there are an estimated 750,000 plant species worldwide, random prospecting is infeasible.⁶ Drug companies must rely on local knowledge to decide which plants to investigate. It is estimated that three quarters of drugs in commercial use originally came to the attention of drug companies because of their use in traditional medicine.⁷ The best example of the inequality this can create is the rosy periwinkle from Madagascar. Madagascar is an extremely poor country but hosts an estimated 5% of the world's unique species, including the rosy periwinkle, which shamanic knowledge uses as a cure for diabetes. It was brought back to America by the Lilly company, which found the periwinkle to be effective in treating childhood leukaemia and Hodgkin's disease. The drug earns Lilly an estimated \$100 million per year (1996 estimate) but Madagascar has never received any financial benefit. The periwinkle is no longer unique to Madagascar – it is now harvested in Texas, so Madagascar does not even gain anything by selling its raw materials. To survive, the islanders are deforesting their island to create arable land. Only 20% of the original forest is left, and many of the unique species must already have been destroyed.⁸ Because Western intellectual property regimes emphasise the 'genius' and 'inventiveness' of the genetic engineers, it downplays both the raw materials and the collective creativity of folkloric knowledge.⁹

The islanders are now prevented from ever marketing their knowledge of the periwinkle as Lilly owns the patent.¹⁰ And while it may seem far fetched that

Mick Taylor, left the band because of a lack of songwriting credit.

⁶ Jaszi and Woodmansee, 1996, p.964.

⁷ Ibid.

⁸ Detailed in Boyle, 1996, pp.127-129 and Jaszi and Woodmansee, 1996, pp.964-966.

⁹ Boyle is left in a small dilemma here, concerning how his overall theory would deal with this situation practically. Firstly, he argues that intellectual property based on the Romantic author (this is a good example of Boyle's argument that assumptions of Romantic creativity underpin all areas of intellectual property) undervalue the sources of such knowledge. This would suggest that islanders of Madagascar should receive some intellectual property rights in the drug (The shamanic knowledge in this instance actually came from the Philippines and Jamaica so maybe they should get the reward). However, this would lead to a further increase in intellectual property rights when one of Boyle's key points is that we already have too many. This issue is almost brought up by Gordon (1998) in a comparison of Boyle and Radin.

¹⁰ Whereas copyright in practice gives a temporal priority in creation, it is theoretically possible that two people could copyright an identical piece of work so long as the later creator can prove that she had absolutely no awareness of the earlier work (no *conscious* awareness is not good enough as the

Madagascar could ever become a successful player in the pharmaceutical industry, such occurrences also exist within the sphere of copyright where developing countries could conceivably attempt to sell indigenous cultural goods (particularly considering that non-western art is currently in vogue). Here is an example from Jaszi and Woodmansee:

Some years ago the gift shop of the Museum of African art in Washington, DC, offered a coffee mug decorated with a characteristic East African motif: black, highly stylized figures of animals on a red field. The bottom of the mug bore two legends: "Made in South Korea" and "©Smithsonian Institution." The community in which this imagery originated had taken no part in, and derived no benefit from, its commodification.¹¹

The culture that created the original motif would now be guilty of copyright infringement were it to try and sell their design on, say, rugs. Nor is this an isolated incident: when Alan Lomax began travelling America to record blues singers, it was the Smithsonian once again that claimed the copyright, leaving the singers in their poverty.

Part of the reason for this inequality in copyright is of course due to wider inequalities in economic power; it would not be possible for the islanders of Madagascar to research and market to the same extent as the Lilly Corporation, the same as it would not be plausible for a country blues singer to be aware of ensuring his copyright when the Smithsonian comes recording. However, the more significant issue is that copyright cannot cope, either theoretically or practically, with a work that is not individualised (either in the classical manner, through collaboration of individuals, or through the company individualisation of work for hire). If a work is a truly collective exercise, it is not possible to attribute authorship. And if a work is an oral communication (such as traditional stories and songs, and shamanic knowledge) then, as far as copyright is concerned, there is not even a work to protect.

Let us put this in the context of popular music. Firstly, it is worth pointing out that much of rock music has an African origin. Work songs and spirituals were a collective enterprise and these eventually developed into the rural blues of the 1910s-1930s. Blues music is a patchwork of quotes:

above George Harrison example showed). In patent law, however, the patent will not necessarily go to the earlier inventor. Rather, it is awarded to the first to patent the invention. Thus, an individual could literally copy another's invention and receive the patent if they are more efficient in their application.

¹¹ Jaszi and Woodmansee, 1996, p.960.

The essence of the blues is the blues couplet. Indeed, the nature of song is such that one might very well define the genre as one big blues composed of a large but finite number of couplets, lines and formulaic phrases; each individual text is but a sub-text of these couplets.¹²

The blues can only be understood as a body of work – a sort of metawork – created collectively. This does not necessarily diminish the individuality of the blues singer/composer, as Tampa Red explained to a budding writer; ‘when you make records, take some from me and some from everybody else to make it your own way.’¹³

The blues is most accurately seen as a music of re-composition. That is, the creative bluesman is the one who imaginatively handles traditional elements and who, by his realignment of commonplace elements, shocks us with the familiar.¹⁴

However, it does mean that it is impossible to understand the blues without an appreciation of its collective origins, as Taft explains;

Because of the formulaic nature of the blues...when a singer sings a phrase or line, both he and his audience recognize that particular part of the song. Perhaps semi-consciously, they compare the specific singing of the phrase with other singings of that phrase and phrases similar to it. In an instant, the singer and his audience compare the way the sung phrase is juxtaposed with others, both with the song being sung and in other songs...Thus, every phrase in the blues has the potential of a literary richness far beyond its specific usage in one song.¹⁵

How can copyright cope with such a collective creation? The answer is that it cannot: it would result in one individual (or, more realistically, the record company) gaining copyright over one entire song. Not only does this not reflect the collective effort involved in creating the song, it would also mean that part of that ‘large but finite

¹² Michael Taft, introduction to *Blues Lyric Poetry: A Concordance* [3 vols.], Garland, New York, 1984, quoted in Gray, 2000, p.373

¹³ Quoted in Gray, 2000, p.374.

¹⁴ Pete Welding, ‘Big Joe and Sonny Boy: The Shock of Recognition’, record notes to *Big Joe Williams and Sonny Boy Williamson*, Blues Classics BC-21, Berkeley, 1969. Quoted in *ibid.*, p.374.

¹⁵ Taft, 1984, quoted in *ibid.*, p.374.

number of couplets, lines and formulaic phrases' would now become private property; it is conceivable that a record company could prevent a blues singer from singing his new song because it infringes upon old songs to which they hold the rights. The cultural commons is infringed.¹⁶

How does this affect popular music? The formulaic nature of blues creation could, in alternative understandings, be described as standardisation. I will leave those discussions to the section on Adorno below. However, the mode of creation used in blues music has been adopted, to some extent, by rock music. While rock has a wider lexicon than blues music, the key idea here is one of tradition; rock music is in the blues tradition and it utilises the conventions of blues. Michael Gray has written a substantial work on the importance of this mode of creation to Dylan's work,¹⁷ and sixties stars such as Dylan, Keith Richards and Pete Townsend frequently refer to their position in the blues/rock'n roll tradition. Dependence upon the blues tradition is often used to authenticate the later artist (Clapton is a good example here). Later rock stars such as Springsteen placed themselves in the tradition of Dylan. Here is one example of how this tradition is manifested:

You know Howling Wolf? He's called Howling Wolf because he sort of howls. Well, Howling Wolf was trying to imitate Jimmie Rodgers, the white country singer from the late twenties. Jimmie Rodgers yodelled, he was called the blue yodeller, combined the blues with Swiss yodelling. Well, Jimmie Rodgers was hugely influenced by black music, which is where the whole blues thing came from. So you've got a black man imitating a white man imitating black culture. Then you've got The Stones and a bunch of other people imitating Howling Wolf. Well, what's original and where's the originality?¹⁸

¹⁶ Here is a very recent example of such a process. Robbie Williams has recently been sued by Ludlow Music for infringing a song by Loudon Wainwright III. William's song, *Jesus in a Camper Van*, contains the line 'Even the son of God gets it hard sometimes / especially when he goes around saying, "I am the way"' while Wainwright's song, *I am the Way (New York Town)*, states 'Every son of God gets a little hard luck sometime / especially when he goes around saying he's the way.' Wainwright's composition, however, borrows from a Woody Guthrie song called *I am the Way*, which contains the line 'Every good man gets a little hard luck sometimes.' Because of this, Guthrie gained a co-songwriting credit on Wainwright's song. However, blues historian Ed Ward states that there are dozens of blues songs containing the 'Guthrie' line, including songs by Blind Lemon Jefferson and Mississippi John Hurt. These artists have no copyright. From http://uk.netbeat.com/news/news_1321.html (visited 21/1/00)

¹⁷ Gray, 2000, pp. 268-379.

¹⁸ Rob Bowman, Associate Professor of Ethnomusicology, York University, Canada, interview with the author.

This idea of placement within tradition is a key way of understanding rock music, and has its formal appearance in rock music also being a patchwork of quotes; the phrase ‘I can’t get no satisfaction’ was originally in a Chuck Berry song; in *Run For Your Life*, The Beatles took the line ‘I’d rather see you dead little girl than be with some other man’ from the Presley song *Baby Let’s Play House*. Copyright cannot deal with this notion of tradition, however. The logic of copyright is one of a denial, and subsequent destruction of, tradition.

TS Eliot discusses the relationship between genius and tradition. He correctly points out that it is ‘our tendency to insist, when we praise a poet, upon those aspects of his work in which he least resembles anyone else.’ However, Eliot argues that individual talent can only be understood within tradition

Tradition...cannot be inherited, and if you want it you must obtain it by great labour. It involves, in the first place, the historical sense, which we may call indispensable to anyone who would continue to be a poet beyond his twenty-fifth year; and the historical sense involves a perception, not only of the pastness of the past, but of its presence...a sense of the timeless as well as the temporal and of the timeless and the temporal together, [and] is what makes the writer traditional. And it is at the same time what makes a writer most acutely conscious of his...contemporaneity...

...what is to be insisted upon is that the poet must develop or procure the consciousness of the past and that he should continue to develop this consciousness throughout his career. What happens is a continual surrender of himself as he is at the moment to something which is more valuable.¹⁹

When Wordsworth was attempting to find an audience for the *Lyrical Ballads*, he also attempted to place himself within a tradition that was recognisable to his readership, although with a sleight of hand, it was a tradition of the acknowledged individual geniuses. As discussed in chapter 2, Wordsworth’s *Prelude* is an example of a tradition of individual selves. However, perhaps unsurprisingly, there has been much subsequent critical debate over which version of the poem should be considered the most authoritative/authentic. This is the result of what Stillinger describes as a ‘kind of textual

¹⁹ 1941, pp.14-17.

primitivism...grounded in the belief that there is only one text for each poem and that each poem corresponds to a single author.'²⁰ This regularly happens in rock music, especially in bootlegging, where the 'definitive' version of a song is sought after. In terms of copyright, the doctrine can deal with the idea of multiple revisions: as long as they were all done by one individual, then that individual owns a copyright in all the different versions of the text (and the editors and publishers will own rights in their own varying versions) but it does highlight a wider problem that the need to singularise both the individual and the text in order to copyright and commodify the work does not reflect the processes of actual artistic practice. Toynbee (2000) has described how creativity in rock music is *processive*. Musical ideas, rather than being pre-planned, tend to occur *through* performance.²¹ However, both copyright and fans' 'textual primitivism' attempts to singularise this processive creativity. I shall return to this when discussing the aesthetic considerations of bootlegging, for it is this kind of conceptualisation of song as an ongoing composition through performance (or sometimes, as is particularly the case with The Beatles, through studio development) rather than as finished product that is missing in copyright's approach to popular music. If rock music is characterised as processive, then it is questionable why owning copyright in the sound recording of the official performance of *Pump it up* means that a record label automatically holds copyright in any performances of the song twenty or more years later. Chances are that it has become a substantially different song, with substantially different meanings for the audience.

There are two final problems of a Romantic centred copyright that have been discussed by others. The first of these is the problem of private censorship.²² Probably the most famous case of copyright being used for this purpose was the United States Olympic Committee preventing the San Francisco Arts and Athletics Inc. from organising a 'Gay Olympics' to fight homophobia. Despite allowing the word 'Olympics' to be used for events such as 'Special Olympics' (disabled) and 'Youth Olympics', the USOC took the organisation to court arguing that it owned the word 'Olympic'.²³ The Supreme Court held for USOC arguing that the value of the word 'Olympic' was the result of the USOC's 'own talents and energy.' The defence of intellectual property was once more supported by the idea of a creative author, though

²⁰ 1991, p.73.

²¹ 2000, pp.53-58.

²² For a theoretical account of the balance of public and private in regard to private censorship and free speech, see Gordon, 1990; Buskirk, 1992.

²³ *San Francisco Arts & Athletics, Inc., et al. V. United States Olympic Committee*, 483 U.S. 522, 107 S.Ct. 2971.

the court seemed to be overlooking the ‘talents and energy’ of those in Greece two thousand years ago.²⁴ There are many other cases of copyright being used censorially: JD Salinger and Howard Hughes both used copyright as an attempt to prevent certain material from being used in biographies;²⁵ Disney forced the closure of a countercultural comic that used Disney characters in pornographic situations;²⁶ and a Minneapolis police officer used copyright to prevent a newspaper from printing his racist story that had appeared in the police department newsletter.²⁷

There is no necessary reason why copyright that relies upon the Romantic author should result in private censorship of such kind. However, by individualising ownership of cultural objects (and in many cases, individualising into corporations) copyright grants powers concerning the availability of such objects to individuals and corporations with specific political interests, and the belief in Romanticism underpinning copyright results in an inherent leaning in favour of the author, as will be discussed in chapter 6. The lack of recognition of public rights in copyright, in terms of freedom to read (the biography cases), public interest (the Minneapolis police case), freedom of speech (the USOC case) and freedom to recreate (the Disney case) are the result of a reliance upon the Romantic author.

The final problem described by critics is really the outcome of all the other problems: copyright produces a chilling effect on creativity. Secondary creators are deterred from developing earlier creations to produce new work. A fear of being found guilty of copyright infringement, or even of becoming involved in an expensive battle with a large corporation.²⁸ It also has a detrimental impact on higher profile creators; Andrew Lloyd Webber is so paranoid about being sued for being unconsciously influenced that he requires that all background music is turned off at any restaurant that he visits. The idea that someone’s artistic output can be entirely self-referential is extremely damaging, both for an individual’s output and for the greater body of work that Eliot labelled as tradition.

A good example of this creative chilling is in the decline of rap sampling. Rap musicians have become increasingly concerned that they will be sued by record

²⁴ Boyle, 1996, pp.145-148.

²⁵ *Salinger v. Random House, Inc.*, 811 F.2d 90 (2d Cir. 1987) and *Rosemont Enters. v. Random House, Inc.*, 366 F.2d 303 (2d Cir. 1966). These and the following examples are taken from Netanel, 1996, pp.294-295.

²⁶ *Walt Disney Prods. v. Air Pirates*, 581 F.2d 751, 753 (9th Cir. 1978).

²⁷ *Belmore v. City Pages Inc.*, 34 U.S.P.Q.2d (BNA) 1295 (D. Minn. 1995).

²⁸ Traditionally, most cases involving sampling in the record industry has been settled out of court. It is in the record companies’ interest to not set a precedent regarding copyright infringement so that

companies if they sample sounds from already existing songs. This chilling effect has now been institutionalised within the industry:

The early days of sampling was like the wild west, people [would] just grab anything and wouldn't pay people, wouldn't even notify them, and people ...began suing. Most of the suits were settled out of court with payment and eventually...people started notifying [labels of their intent to use a sample] and a bunch of sort of common place rates began to be worked out, for a small sample x, for a sample that is looped for the whole song, it becomes the basis the whole song, obviously x more. Most of these tended to be one time payments, sometimes they were worked out to be a percentage of royalties, you know 5% of the songwriting royalties or a 100% of the songwriter's, 10% or whatever. And ... it's actually had a very detrimental effect on rap because it's now become so expensive to sample - to properly licence - that the majority of rap recordings have evolved to the point where sampling is minimal. There's not a lot of sampling going on anymore - which is really a curious thing that I don't think anyone could have predicted - because it simply costs too damn much. So you know, you get a new rapper signed to a label and they say, 'okay, your sampling budget is x' which means you can do a couple of things here, a couple of things there, but you can't do what Public Enemy used to do where there would be 20 samples in a song. And the most recent Public Enemy CD [*He Got Game*], which was the first one in six years is actually much thinner, and much less interesting because of that. One of their geniuses was the ability to manipulate and play with samples and it's been taken out of their hands.²⁹

The problems of a Romantic centred copyright as discussed by other theorists are thus: 1) Romanticism does not reflect true artistic practice as all authorship is by nature collaborative; 2) it cannot deal with the concept of a truly collective authorship, nor reflect cultural production that is primarily oral. Among other detrimental effects this results in discrimination against third world or indigenous minority cultures; 3) it does not take into account the importance of tradition to creation, in terms of borrowing from those who went before you in your tradition and in terms of borrowing from an author's

they can use their size to intimidate individuals by threatening repercussions greater than what would actually be likely. This scare tactic is also often used against bootleggers.

earlier selves; 4) it strengthens the position of those who seek to use copyright for political reasons through private censorship; the net result of all this is 5) it results in a chilling effect on creativity. So, if all these problems ensue from a Romantic notion of creativity, how else could we conceptualise creativity?

Theodor Adorno

It may seem odd that I am using someone as Romantic as Adorno to challenge concepts of Romanticism. However, I am not using his work to challenge the ideas of individual creation and autonomous art inherent within Romanticism. Rather, I wish to use Adorno's work on the culture industry to highlight that economic factors play at least as high a part in the creation of cultural goods as aesthetic criteria. From this, I will question whether a *sui generis* form of protection, based on the economic facets of copyright, patent and trademark protection, rather than copyright, are more appropriate for culture industry products.

Copyright is a legal form that attempts to bridge the ideological divide of art and market upon which it is partly based. If this divide were true, copyright would have no need to exist: if an artist is creating for the sake of art then she will have no interest in financial remuneration for her work as only art can judge its success; if an artist is producing for financial gain then *a priori* he is not an artist. However, Romantic subjectivity largely consists of our unique individual selves as owners of private property. The artist can only exist as a financial being and thus has a foot in both sides of the ideological divide.

Adorno's work on art and the culture industry is sophisticated, but offers a paradigmatic juxtaposition of art and market. For Adorno, art is characterised by its radical autonomy. Art rebels against the reifying effects of commodification and thus, by virtue of its social position, inherently criticises the society from which it retreats. The second keystone of Adorno's work is that art is the expression of an alienated subjectivity. This partly stems from his formative artistic development in expressionism and manifests itself in his admiration of Schönberg.³⁰ However, the work of art is a dialectical relationship between the particular and the universal so that, in expressing individual alienation, the work of art challenges social contradictions; 'culture is the perennial protest of the particular against the universal as long as the universal is

²⁹ Rob Bowman, interview with the author.

³⁰ See Lunn, 1982, pp.60-64 and pp.195-198

unreconciled with the particular.’³¹ In reception also, Adorno views art as a solitary activity, and thus his preference for literature and music.

Modernist music, for Adorno, requires structural listening – the listening of the part in relation to the whole of the piece. Structural listening is thus mimetic of the relationship between the particular and the universal. All of this means that art can remain critical of modern society while maintaining its autonomy. This occurs through the process of de-aestheticisation: by making ugliness thematic, art manages to remain on its tightrope, resisting commodification while emphasising its solidarity with the oppressed of the world, trying to give voice to those forces that are constantly suppressed in an aestheticised world.³² In Adorno’s words, ‘a successful work... is not one which resolves objective contradictions in a spurious harmony, but one which expresses the idea of harmony negatively by embodying the contradictions, pure and uncompromised in its innermost structure.’³³ For Adorno, the power of the great works of art was not only the reflection of the contradictions of society but the keeping alive of utopia through the honest acknowledgement of its absence. What would be most inimical to society is a false reconciliation between autonomous, critical art and the repressive world.

Counterposed to autonomous art is the culture industry, which Adorno abhors for offering this false reconciliation. The culture industry offers the promise of personal gratification for all while at the same time continuing the negative integration of society. It masks the social contradictions by promising equality within the cultural sphere. It does not promise utopia, it claims that this is the real thing.

For our current purpose, this look at the culture industry is concerned primarily with the production rather than the consumption of cultural artefacts. As already stated, Adorno saw art as being the creation of an alienated subjectivity. However, any subjectivity has been negated in mass culture, hence the emphasis in the term ‘culture industry’.³⁴ Culture industry products are driven by the profit motive and not by any inherent aesthetic structure. The two main features of culture industry products are standardisation and pseudo-individualisation. Let us talk for the moment of a popular song. What Adorno is arguing is that there are a number of specific elements that are the

³¹ quoted in Rose, 1978, p.116

³² Wolin, 1979, p.114

³³ letter to Walter Benjamin in Adorno et al., (1995), p.146.

³⁴ ‘In our drafts we spoke of “mass culture”. We replaced that expression with “culture industry” in order to exclude from the outset the interpretation agreeable to its advocates: that it is a matter of something like a culture that arises spontaneously from the masses themselves, the contemporary from

skeleton of popular songs (32 or 12 bar pattern, AABA structure and so forth) that are inviolable for anyone wishing to write a popular song. The outcome of standardisation is that the listener knows what to expect, the work is pre-digested, 'the composition hears for the listener.'³⁵ In an attempt to mask standardisation, there is a process called pseudo-individualisation which inserts the hook of a song, the shoo-be-doos, the improvised solo and such like, to make the song distinctive. However, these are irrelevant to the actual composition of the song because: a) they are themselves taken from a stock of standard embellishments and so are as standardised as any other features of the song; and b) they are completely interchangeable – there is no formal logic why a specific embellishment should occur in any particular song. The net result of this is that, in popular music, the parts and the whole are divorced. They do not maintain the dialectical relationship between them that exists in art music, and thus prohibit structural listening:

To sum up the difference: in Beethoven and in good serious music in general - we are not concerned here with bad serious music which may be as rigid and mechanical as popular music - the detail virtually contains the whole, while, at the same time, it is produced out of a conception of the whole. In popular music the relationship is fortuitous. The detail has no bearing on the whole, which appears as an extraneous framework. Thus, the whole is never altered by the individual event and therefore remains, as it were, aloof, imperturbable, the unnoticed throughout the piece.³⁶

Because of standardisation, 'the composition hears for the listener'.³⁷ The listener, who is easily distracted, does not have to concentrate on the song because she knows what is coming next. This is antithetical to Wordsworth's conceptualisation of a relationship of equals that was discussed in chapter 2.

There is no doubt that much of what Adorno argues about standardisation in the culture industry rings true.³⁸ Standardisation is one of the key features of culture industry

of popular art. From the latter, the culture industry must be distinguished in the extreme.' *Culture Industry Reconsidered*, in Adorno, 1991, p.85

³⁵ Adorno, 1941, p.306

³⁶ Ibid., p.304.

³⁷ Ibid., p.306.

³⁸ Some critics of Adorno have suggested that standardisation may be a positive effect in the formation of shared identities for cultural consumers. Whether this is the case does not matter here: even with valid aesthetic causation in some instances, standardisation is one of the most important

products and, with the development of generic categories (so you know to go to the disco rather than easy listening section of a record shop) is used to attempt to shape consumer demand and increase the predictability of cultural markets. Whether standardisation is a good or bad thing is irrelevant to our current discussion. While noting Toynbee's argument that there are aesthetic reasons for an 'inevitability of genre',³⁹ what is important for our purposes is that, in culture industry terms, standardisation is primarily the result of capitalist rationalisation strategies rather than aesthetic ones.

Yet copyright exists on the rhetoric of the aesthetic code. The key features of culture industry are standardisation and pseudo-individualisation, but copyright relies upon a doctrine of originality. If Adorno's reading is correct, it is oxymoronic to think of originality in the culture industry. The way the culture industry works is by creating the same product over and over. If this is so, then what originality is there to protect? How can any product in the culture industry be said to be sufficiently original to warrant copyright protection? Perhaps we need to look at why a cultural artefact is made; whereas autonomous art is produced for its own ends, and thus as the result of its own internal logic, culture industry products are produced specifically for their exchange value. A culture industry artefact does not have its own internal logic, it depends on the logic of the market, and that logic is not one of originality but of standardisation.

Following this logic let us, for the moment at least, abolish the originality requirements from copyright, in the assumption that all cultural products are the same. In fact, let us abolish aesthetic impulses altogether and ask what economic reasons exist for some form of intellectual property protection in the culture industry. This was, after all, the original reason for the invention of copyright. Is it now possible to base intellectual property protection in the culture industries solely on economic criteria? We should remember that copyright originally was seen not as an incentive to produce but rather as an incentive to publish. The publisher's property is fragile because it can be easily copied. Some types of intellectual property are more fragile than others but all forms of intellectual property can be copied. Copyright exists to give the publisher an incentive to publish works which they would otherwise find copied very quickly (and quite a good incentive it is too, considering that the copyright industries are some of the most profitable in the world). Therefore, *some* protection of intellectual property is obviously necessary if publishers are to release anything other than the most secure cultural products, or those products with which they can gain a quick market advantage before

industrial mechanisms utilised by the cultural industries and as such is most often driven by economic motives.

widespread copying occurs (by, say, marketing the release of a new album and refusing to issue it until a set number of pre-order purchases has been achieved).

But if protection is based on economic necessity, let us base the protection on economic criteria. If we were to reconceptualise intellectual property protection in the culture industry along economic lines rather than aesthetic ones, it may indicate that protection more akin to patent or trademark law would be more appropriate.⁴⁰ Protection akin to patent could offer strong protection of the cultural work for a much shorter period of time. Patent law, however, is not so harsh on derivative works as copyright law: in copyright law, a work can be infringing if it has used a work already copyrighted without the permission of the rights holder;⁴¹ in patent, however, the secondary creator can apply for an 'improvement patent.'⁴² This would be one possible way of easing the chilling effect on creativity.⁴³ Patent law also contains the idea of a 'shop right'. This means that if an inventor is employed (i.e. in a work for hire situation) and thus cannot license the patent personally, she can use the invention for her own personal use/development without infringing her company's patent. Hughes discusses how this could be transferred to copyright to protect individual styles even when copyright in an earlier work in the same style by an artist has been sold. This would stop the possibility of an artist being sued for an infringement of one of her earlier works. While it sounds remarkable, this was the case of John Fogerty who, in 1988, was sued by his former record company because his new song sounded too much like one of his old ones which was under their copyright.⁴⁴ This idea, which Hughes calls a 'moral shop right', could be used as one way to level out inequality in the capital/artist relationship in work for hire situations.⁴⁵

Using the idea of strong protection for a limited period of time would provide publishers with an adequate incentive to publish works from which they would gain a

³⁹ Toynbee, 2000, p.108.

⁴⁰ I do not think that either patent or trademark laws offer a better, more coherent method of protection for cultural works. I am merely suggesting that some of the bases for both may be more suitable as the basis for copyright than the current, Romantic, basis of copyright. I do believe, however, that there are facets of both trademark and patent law which may prove useful in a form of intellectual property protection best suited for cultural products.

⁴¹ For example, a play that was written concerning the nature of Hollywood in the thirties was held to be infringing the rights of those in control of the Marx Brothers' rights as a small part of the play included the Marx Brothers putting on a Chekov play. The entire play can now not be performed without permission of the Marx Brothers' estate. See Lange, 1982, pp.159-165. See also the section on Jeff Koons in chapter 3.

⁴² Gordon, 1990, pp.1018-1019.

⁴³ Patents also have to satisfy strict criteria of originality in order to be eligible for protection. I am uncertain whether this would be appropriate for copyright protection; it would certainly prove problematic for a record company trying to gain protection for another Phil Collins single but maybe this would be no bad thing.

⁴⁴ Adam Sweeting, (2000), 'The saddest story in rock', *The Guardian*, 11 July, G2pp.14-15.

⁴⁵ Hughes, 1998.

quick return (top forty bands and blockbuster movies) but would not provide an incentive to publish slower moving works. When promoting his copyright act, Wordsworth made this point in his anonymous letter to the *Kendal Mercury*:

... a book for which there is a great demand would be sure of being supplied to the public under any circumstances; but a good book, for which there might be a continued demand, though not a large one, would be much more sure of not becoming a “dead letter”, if the proposed law were enacted than if it were not... But what we want in these times, and are likely to want still more, is not the circulation of books, but of good books, and above all, the production of works which look beyond the passing day, and are desirous of pleasing and instructing future generations.⁴⁶

It is these types of works that, following Wordsworth’s criteria, publishers need encouragement to publish. A straight implementation of patent law principles would not achieve this. One possibility would be to enact market criterion to judge those publications which are eligible to be renewed for longer periods of protection (or regularly renewable shorter periods of protection after the first period of protection). This would actually be a reverse use of a principle used in trademark and patent law: a trademark in the UK can be revoked if it has not been used for five years⁴⁷; a compulsory licence can be issued on a patent if the invention is not being used enough.⁴⁸ My suggestion here is that it would be possible to renew copyright protection only if a publication *had not* been commercially successful, with the requirement of its continued publication. The condition of mandatory publication is extremely important, and with current technological developments, a practical possibility. By using a principle attached to trademark legislation, it could be possible to state that if a copyright owner has not published a work for more than, say, three years, then copyright in the work is forfeited. This would alleviate a current problem of copyright, that once it becomes economically unviable to continue to publish a work, copyright holders are still able to prevent another publisher from producing a copy of the work. A mandatory publication clause would ensure the continued publication of works ‘for which there might be a continued demand, though not a large one.’ Another possible solution to this problem would be that

⁴⁶ *Letter to the Kendal Mercury*, in prose 3:308.

⁴⁷ Bainbridge, 1999, p.9.

⁴⁸ *Ibid.*, p.8.

works that satisfied strict quality criteria (as in patent) would be entitled to longer periods of copyright protection.⁴⁹

I am not suggesting that all or any of these possibilities are necessarily practicable. And as they are discussed here, they still perpetuate a split between art and market. They do, however, seem to provide a more accurate reflection of the commercial impetus for the production of cultural works, rather than relying on aesthetic mythology for their justification. Conceivably, they could also strengthen the artist's position in his relationship with publishers and enable longer periods of protection for those works deemed on the 'artistic' side of the dialectic rather than the 'commercial'.

To a certain extent, protection akin to patent and trademark law already exists in the doctrine of 'neighbouring rights'. The rights owned by a record company protecting a sound recording are shorter than the copyright in the musical work. However, because of their intricate relationship with notions of authorial creativity, there is the tendency to give too many rights to record producers (and others) for too long a period of time. The culture industry is characterised by a rapid turnover of product, but because copyright is concerned about giving John Lennon protection for as long as possible, it also gives protection to EMI for as long as possible and because of the rhetorical unification of publishers' and authors' interests, publishers' and record companies' neighbouring rights have a tendency to increase at a comparable rate to that of authors' copyrights.⁵⁰

In this section, I am not necessarily condoning Adorno's opinions of the culture industry. However, I have used his theory here to illustrate that most production in the culture industries is economically motivated, and have thus used it to suggest some possible policies for copyright that an understanding of this might entail. There is no guarantee that rights based on the market criteria that I have suggested here would not lead to an extension of rights for publishers. However, if the image of the Romantic artist is detached from the justification of copyright, it may be possible for the concept of public benefit to re-enter copyright discussion. Yet this removal of Romanticism from copyright rhetoric would only allow the strengthening of the public's rights as *users* of copyrighted works. The theories of Goldmann and Barthes that I shall now discuss offer a way of strengthening the public's rights in copyright as *creators* of the protected work.

⁴⁹ Although this creates the problem of someone having to make an aesthetic judgement concerning whether a work would warrant protection, which current copyright legislation manages to avoid.

⁵⁰ Gillian Davies of the IFPI states 'In these days ... when every form of intellectual property is under attack, it is becoming more widely recognized that the rights of authors are not weakened or whittled away, but on the contrary strengthened, by the granting and upholding of parallel rights for producers of phonograms'. Quoted in Agnew, 1992, p.131.

Goldmann's work, which like that of Adorno and Barthes I am not unequivocally endorsing, offers a paradigmatic position of collective creativity that can be used to challenge the Romantic conception of individual genius. The basis of Goldmann's theory lies in the statement that 'no important work can ever be the expression of a purely individual experience.'⁵¹ For Goldmann, understanding works as individual experience would lead to reductionist theorising - that the works of Eliot were nothing more than the expression of Eliot. What Goldmann posits instead is the *collective subject*. The collective subject is what emerges from a social relation or social group. So, in his example, if two people pick up a table, the lifting is not the result of any individual action but of a collective subject.⁵² Just as for physical factors so too for mental ones, and thus exists a collective consciousness. However, this collective subject is in no way separated from individuals: 'there is no question in all this of a collective consciousness that would be situated apart from individual consciousness, and there is no consciousness other than that of individuals.'⁵³

A social group has its own mental structures which shape the action and consciousness of individuals within the group. Mental structures are 'the categories which simultaneously organise the empirical consciousness of a particular social group and the imaginative world created by the writer.'⁵⁴ Goldmann distinguishes between the real collective consciousness of a group and its potential collective consciousness.⁵⁵ The most coherent and unified potential consciousness Goldmann terms a *world view*. This is the maximum potential consciousness.

A great work of art, for Goldmann, is one which can express the world view of a social group. Here Goldmann attempts to give an analytic base to aesthetic value. 'Great philosophical and artistic works represent the coherent and adequate expressions of...world views.'⁵⁶ However, at least in his early work, Goldmann is not suggesting a mechanistic or deterministic relationship. Firstly, he does not attempt to give a work of art a solely sociological explanation. An analysis of the work of art must constantly fluctuate between the internal formal laws of its own structure and its immanent

⁵¹ Goldmann, 1973, p.131.

⁵² Goldmann, 1966, pp.246-247.

⁵³ Ibid., p.248.

⁵⁴ Quoted in Williams, 1971, p.12

⁵⁵ Goldmann argued that the difference between dialectical and non-dialectical criticism was that non-dialectical criticisms worked from the actual consciousness of a social group while dialectical criticism from the potential consciousness.

relationship to the social group's mental structures, beginning with aesthetic appreciation.⁵⁷ Goldmann states that neither one of these approaches on their own is satisfactory: 'explanation always refers to a structure that contains and surpasses the structure being studied'⁵⁸ but 'sociological analysis does not exhaust the work of art and sometimes does not even succeed in touching it.'⁵⁹ Secondly, Goldmann emphasises that only 'certain exceptional individuals' could create great works of art - 'nobody would dream of denying that literary and philosophical productions are the works of their authors.'⁶⁰

The role of the individual proves problematic in Goldmann's later work, however, and he has often been accused of understating the role of the individual within creation.⁶¹ But Goldmann's later notion of creativity does not necessarily have to be accurate for the idea of the 'collective subject' to be of value. As Goldmann argues, the work of art cannot solely be seen as the product of an individual consciousness. There does exist a level of social consciousness which emerges from, but is more than the sum of, individual consciousness. It is difficult to talk of the aspirations or fears of a group without the spectre of reification, but it does seem that a group consciousness, while never being detached from the individuals that make up the group but rather is emergent from them, shapes the thoughts of the individuals within the group. Goldmann correctly states that 'biography is only a partial and secondary level of explanation.'⁶²

The notion of the collective subject is slightly different from the descriptions of collective creativity described earlier in traditional and oral cultures. These earlier descriptions seem to imply a more active, praxis based creativity whereas the collective subject is more structural. However, I now wish to combine the two approaches to collective subject/creativity to make the following two statements about creativity which copyright ought to accommodate: 1) all creative activity occurs socially/collectively; 2) even those creations seemingly most individual are influenced by the consciousness of a collective subject. There is thus no uniquely individual creation in existence. Even those

⁵⁶ Quoted in Routh (1979), p.156.

⁵⁷ 'For before seeking the connections between a literary work and the social classes of the period in which it was written, it is first necessary to understand its significance in its own terms and to judge it aesthetically as a concrete universe of beings and things through which the writer who created it talks to us.' Goldmann, 1975, p.41.

⁵⁸ Goldmann, 1966, p.250

⁵⁹ Ibid., p.51.

⁶⁰ Goldmann, 1975, p.43.

⁶¹ A famous obituary headline of his accused him of producing a 'portrait of the artist as a midwife.' David Caute in *Times Literary Supplement* 26 November 1971.

⁶² Goldmann, 1975, p.41. This is in distinction to the proto-Romantic Samuel Johnson's *Lives of the Poets* and the huge number of rock biographies available today containing the 'assumption that the meaning of the music can be found in the lives of its makers.' (Toynbee, 2000, p.ix.)

works we hold as most individual, such as those of Picasso or Pollock, are enabled and constrained by the conceptual playing fields defined by the collective subject. This, of course, is in contradiction to the Romantic understanding of individual creativity and of the artist 'creating the taste by which he is to be enjoyed.'

Roland Barthes

The ideas that I shall discuss here, taken from Barthes' seminal essay *The Death of the Author*, have been popular in literary theory for at least the last thirty years. I do not intend to go into the literary debate in any great detail for to do so would unnecessarily obfuscate matters. Rather, I shall use the ideas of Barthes' hyperbolic essay as a paradigm position for discussion on copyright.

In distinction to earlier notions of musical creation (such as folkloric) and to African ideas of musical creation where listening to music is itself a performative act (see below), Romanticism contains a notion of authorship which involves a singular creator producing a work that is the embodiment of the author's meaning. The meaning is thus inherent in the work and we, as Romantic listeners/readers contemplate the work's meaning from outside. We try and understand what the author intended to say. This is the model of communication that is manifested in copyright:

It is the laws and practices of copyright which guarantee the exchangeability of cultural works as commodities; and it is precisely the commodity nature of such a guarantee, which further conditions the separation of the moments of production and consumption as the main moments of analysis. In so doing, copyright practice proposes a particular model of communication – from the sender, whose work is considered fully embodied in the complete work/product, to be understood when 'consumed' by the reader.⁶³

It is this notion of the listener searching for the author's meaning in the work that Barthes' essay criticises. Barthes argues that it is impossible for us to ascertain an artist's intentions because 'writing is the destruction of every voice, of every point of origin.'⁶⁴ We cannot possibly know what the author intended because we cannot even know exactly *who* is speaking. Stanley Fish, writing on Derrida's work on the same issue,

⁶³ Clayton and Curling, 1979, p.37.

⁶⁴ Barthes, 1977, p.168.

explains ‘even when the author is physically present, he will not be an unmediated entity either in his own or in his interlocutor’s eyes’ therefore ‘utterances are *only* readable (as opposed to being deciphered or seen through) even in the supposedly optimal condition of physical proximity.’⁶⁵

It is particularly the case that we do not know who is speaking in popular music because the performer is, explicitly and implicitly, playing a role (Bowie is probably the best example here).⁶⁶ However, even in perfect conditions, it is still impossible for us to know what the author is ‘really saying’. For Barthes therefore, we must lose our dependence upon the ‘Author-God’ by acknowledging the ‘death of the author.’ If we accept the author’s disappearance, then we can liberate the site of meaning within communicative culture: the reader. It is the reader of the text that originates the meaning of a work.

Thus is revealed the total existence of writing: a text is made up of multiple writings, drawn from many cultures and entering into mutual relations of dialogue, parody, contestation, but there is one place where this multiplicity is focused and that place is the reader, not, as was hitherto said, the author. The reader is the space on which all the quotations that make up a writing are inscribed without any of them being lost; a text’s unity lies not in its origin but in its destination.⁶⁷

A good example of how the meaning of a work can change is Bob Dylan’s *It’s alright ma (I’m only bleeding)*. Dylan wrote this song in 1964 and released it on the album *Bringing it all back home* in 1965. He played it in the majority of his concerts in 1964 and 1965. In the sixth verse of the song is the line ‘Even the president of the United States sometimes must have to stand naked’. Though the song was well received in concert, neither this line nor any other was singled out for any specific audience response. When Dylan was performing his first tour for eight years in 1974 he chose to

⁶⁵ Fish, 1982, p.703. Emphasis in original. ‘Only’ in this context means ‘nothing more than’ rather than ‘are not readable anywhere else.’

⁶⁶ Things become more confused in the realm of the singer/songwriter where critics and fans return to a much more rigid Romantic position and readily place an autobiographical slant on songs. In a 1985 interview with Cameron Crowe for the booklet of *Biograph*, Dylan criticised the autobiographical approach of his critics: ‘I read that this [‘You’re a big girl now’] was supposed to be about my wife. I wish somebody would ask me first before they go and print stuff like that. I mean, it couldn’t be about anyone else but my wife, right? Stupid and misleading jerks sometimes these interpreters are... Fools, they limit you to their own unimaginative mentality.’ For a discussion of the relevance of the Death of the Author theory to an analysis of Dylan’s work, see Marshall, 1997.

⁶⁷ Barthes, 1977, p.171.

perform this song at every show. This tour was at the height of the Watergate scandal, and the line created what appears to be a spontaneous cheer from the audience at each of the shows. The meaning of that particular line had changed because of the context, even though that was not how Dylan (the Author-God) intended the line to be understood in 1964. The 1974 tour was officially recorded and released on the album *Before the Flood*. This made many people who were not actually at the shows aware of the audience response. This 'spontaneous' cheer then became part of the standard way of participating at a Bob Dylan concert, and whenever he sang the line in concert over the next twenty five years, it would always elicit a 'spontaneous' cheer. Again the meaning of the line had changed and the context was now of a rock cliché. In 1998, when Bill Clinton was denying that he had ever had sexual relations with Monica Lewinsky, the line elicited a new response; still a cheer, but this time heavily ironic. In this way the song, as it creates meaning within the concert context, has changed a number of times over its lifetime. The meaning is created by the audience or by the performer and audience in unison (Dylan's use of the song in 1974 is unlikely to have been a coincidence), not merely given by the author. By only concentrating on what Dylan 'really meant' when he wrote the song in 1964 eliminates these later possibilities.

It is the notion, of the reader/listener being the originator of the meaning of a text/song, that I wish to take from Barthes' work to my investigation of copyright. It is not necessary to wholly agree with Barthes' position to agree with the idea that the listener imbues the song with a particular meaning that is separate from any meaning imbued by the artist. A significant part of the communicative impact of the work comes from the recipient of the work. In a situation such as a rock concert, this meaning can be imbued collectively (by the entire crowd), individually (by one member of the audience), or in partnership (by the crowd and the artist simultaneously) but the meaning of the work is never entirely generated by the artist. This can be better appreciated if we understand rock's 'African' origins and the importance of performance which Charles Keil characterises in terms of 'embodied meaning' (the Romantic notion of meaning being inherent in the work) and 'engendered feeling' (the aesthetic used in African and/or performative music, and thus rock) where the emphasis is on producing a response from the listener; there is 'an ethical commitment to social participation rather than purely individual or "random" expression... and listeners also have a responsibility – to engage with the music (rather than just to contemplate it), to follow the musicians' decisions as they are made, and to respond to them.'⁶⁸ The music is thus created to elicit

⁶⁸ In Frith, 1998, C6.

a response (develop a meaning) *with* the audience, not to deliver a message to them. This type of music is an ‘adjectival experience.’⁶⁹ This corresponds to how Rose describes literature in the early modern period when ‘it was usual to think of a text as an action, not as a thing.’⁷⁰ The worth of a text was measured by the effect it had on its reader. However, ‘the nineteenth-century shift from music as rhetoric to music as art meant devaluing the listener’s role in musical judgement.’⁷¹

By using the ideas of Barthes, we can try to revalue the listener as the site of meaning. However, the theories regarding the death of the author are concerned with the interpretation of the literary text rather than its production⁷² and so a copyright regime would not have to abandon its notions of authority altogether to take account of literary theory.⁷³ But if we understand art to be an ‘adjectival experience’, if we take an aesthetic based on ‘engendered feeling’, then the importance of the work becomes its creation of meaning and the listener takes on an even more prominent role in the *production* of the work. By putting the arguments of Barthes and Goldmann together, we can see how the social/public have a part to play in the creation of the work and should be considered more than merely users of a copyrighted work. In the next section, I shall look at how we could possibly use such insights in reframing copyright law.

A positive public right in copyright

The reason that I have used the above theories is that currently the public is viewed merely as users within copyright law (‘users’ also includes ‘secondary creators’). Even when copyright was originally designed for the public benefit, the public was cast in this role of passive recipients of the copyrighted work. The result of this is what I am calling a ‘negative public right’ in copyright. Within copyright doctrine, the rights of the public are defined negatively, as those which do not infringe the author’s rights. This is how Fair Use is conceptualised - the author’s rights are limited by some statutory exceptions to their rights. There is no positive right for the public, no ‘right to read’, as mentioned earlier. It is this categorisation of the public, which is the corollary of the Romantic characterisation of the artist, that has facilitated the decrease of the public’s

⁶⁹ Ibid, p.263.

⁷⁰ Rose, 1993, p.13.

⁷¹ Frith, 1998, p.256.

⁷² Graham Falconer, (1995), review of Stillinger (1991) in *Comparative Literature* 47:2, p.176.

⁷³ Fish points out the difference between law and literature on this issue: ‘One might contrast the law, where interpretative practice is such that it demands a single reading (verdict), with the practices of

rights in copyright. The ideology of Romanticism elevates the role of the artist and thus prioritises the creator over the user. The legislative expansions of copyright stand as further homage to the individual geniuses. The theories of Goldmann and Barthes, however, offer alternative configurations whereby the public can be viewed as an elemental component of creation. And there is no necessary reason that taking insights from these approaches has to eliminate the importance of the individual to the creation of an artistic work. Rather, creation can be seen as a partnership between the collective subject (Goldmann), individual listeners giving meaning to a work (Barthes) and the traditional author. In this way we may be able to conceive of a positive public right in copyright rather than, as currently conceived, only a negative public right. I shall now go on to discuss some possibilities for how such a positive right could be conceived.

Steven Wilf (1993) has used the ideas concerning the construction of meaning to discuss what he sees as the public authorship of trademarks. He argues that trademarks, more than any other form of intellectual property, rely on public consciousness and the public's association of a mark with a meaning. This meaning can change over time: Wilf gives the examples of once distinctive marks which have become generic (such as 'Thermos' and 'Hoover') and of cases of parody (such as a company that mimicked the Nike logo on T-shirts with the slogan 'just did it'). To these could be added the situation where groups begin to develop the meaning of a cultural artefact in new contexts, such as the gay appropriation of celebrities such as John Wayne and Mae West,⁷⁴ or when Star Trek fans begin to write their own stories utilising the characters of the show.⁷⁵

Wilf argues that this conception of symbolic meaning creation is a necessarily two way process whereas traditional trademark doctrine assumes an extremely pliable audience. He does not, however, pin down the practical ramifications of this conception. He correctly argues that his suggestions 'address the question of collective identity',⁷⁶ stating that if 'legal notions of property have created the bounded self, then intellectual property, I believe, can serve as a model for an unbounded, collectivist self'⁷⁷ but does

literary criticism, where the pressure is for multiple readings (so much so that a text for which only one reading seemed available would be in danger of losing the designation "literary").' (1982, p.709).

⁷⁴ See Coombe 1994, and Hughes, 1999.

⁷⁵ See Coombe 1994. These situations are, to me, challenges to authorial ownership that, in part, are a reflection of the social role of authorship. In this way they have many similarities with bootlegging.

⁷⁶ He does, however, perpetuate a split between author and public by temporally prioritising the author: '...association occurs in two stages. During the first stage, a producer associates a sign with an object... During the second stage, that association is recognized and invested with meaning by the public as an interpretative community. Following association of the object with the sign there is a third stage there the object-sign association is contextualized within a broader cultural context.' (1999, p.8). This is a practical necessity for law, but does not take into account the importance of the collective subject in the initial moment of creation.

⁷⁷ Ibid., p.46.

not discuss how this could work in trademark law. He points out ‘if the public can be shown to be an author or symbolic creator, then, perhaps the same authorial rights granted to individual creators... can be attributed to the public as well’⁷⁸ but his only practical conclusion is ‘a public authorship model shifts the burden of claims, away from the public and back to the private enterprise seeking trademark protection... it is the trademark holder's proprietary claims that are limited *ab initio* because of the public contribution in creating the mark.’⁷⁹

Wilf's work is a good example of the importance of the public in creating meaning in intellectual property. Rotstein also begins from this premise, and his work offers a number of ways that copyright could be adapted to reflect the public as co-creators of the text.⁸⁰ They are based on the argument that copyright should be reformulated as a speech act rather than as a property regulation. In this way, the work reflects both the dialogic nature of its creation and the rhetorical nature of the work (as discussed above). Rotstein suggests two practical reformulations of copyright law.

The first of the changes that Rotstein advocates is a reformulation of the idea/expression dichotomy. He argues that we should think in terms of ‘convention’ which means that those elements of a work that are more generic would receive less protection

Acknowledging that the terms “idea” and “expression” really mean “convention” and “modulation of convention” could encourage a debate over whether certain elements of highly successful texts should, in fact, receive less protection than the current system of copyright affords. Those literary critics who challenge the copyright system bemoan the artist's inability to exploit cultural icons (for example, the “Superman” character). If the issue is cast in terms of “idea” and “expression”, it is easy for a court bound to a modernist notion of “work” to characterize such popular characters as “expression”, thus affording copyright protection to the owners of the characters without exploring in any detail the countervailing social

⁷⁸ Ibid., pp.2-3.

⁷⁹ Ibid., p.5.

⁸⁰ Rotstein, 1993. Rotstein begins with a misconception: he argues that the Romantic conception of authorship is no longer important in copyright law as it was overtaken by the category of the autonomous work (as invented by Modernists and the New Critics) as the object of copyright. This approach posits the work as something distinct from the artist. However, it does not take into consideration that the modernist work of art was the apex of Romanticism as the artist's individuality was embodied in the work (Taylor, 1989, C24). Jaszi (1991) explains that the work did become the

policies favoring lesser protection. Yet if, as I have suggested, “idea” means “convention”, then the copyright system must confront the question whether a character like Superman has become a cultural convention, and if so, whether that necessarily means that Superman should be available to all.⁸¹

In the case of Superman, this would include whether the notions of hidden/dual identity, a hero with superhuman powers, the stereotypical flying pose, *et cetera*, had become part of social convention. The fact that his dual identity is one of a journalist for the *Daily Planet* in Metropolis could be considered modulation of convention. This could be the case *even if the rights holders had created the convention*, as in the case of Superman. While it could be argued that this way of thinking prevents the creators from fully exploiting its commercial value,

The counterargument to this might be that a text, like Superman, that has become highly conventional will ordinarily have reaped huge financial benefits for the copyright owners. It would thus not be unfair to permit the culture, which has, through mass consumption of the text (for example, through such diverse activities as repeated viewing of the text, word-of-mouth, idolization) adopted aspects of the text as its own, to exploit those conventional aspects.⁸²

This counterargument contains two elements: firstly, the public has played a part in creating the convention (similar to Wilf’s argument on trademarks); secondly, there is an element of the financial criteria that I suggested in the section on Adorno. If a project has become successful enough to embed itself in popular consciousness so that it becomes part of the intellectual commons then the creator (in the traditional sense) has probably been adequately rewarded for their creativity.

This reconceptualisation of idea/expression into convention/modulation also appears to be a good way of dealing with the issue of genre. Frith describes genre as the most important concept in popular music.⁸³ For instance, it would enable songwriters

focus of copyright law in the early twentieth century but argues that this was based on a Romantic reading of authorship. This point is reiterated by Aoki (1993) in a comment on Rotstein’s article.

⁸¹ Rotstein, 1993, p.773.

⁸² Ibid., p.774.

⁸³ Frith, 1998, p.95: ‘Finally, in the world of popular music, ideological and social discourses are invariably put together *generically*. It is genre rules which determine how musical forms are taken to convey meaning and value, which determine the aptness of different sorts of judgement, which

working in a particular genre to utilise the more conventional aspects of that genre, and perhaps enable them to use less conventional elements of other genres (such as with rap music) without fear of infringement. This would enable us to lose the current legal nonsense that a rap record is in unfair competition with a seventies ballad which it has sampled. It would also allow artists to make use of the most important (culturally diffuse) social icons (for example, appropriation artists could use the picture of Superman in their collages; countercultural comics could use Disney characters in their strips). Finally, this reconceptualisation brings into question the importance of time to copyright judgements. If Superman has become conventionalised, it has done so starting from nothing in 1938 and was developed by Marvel Comics, and perhaps more importantly by Warner Brothers with the production of the film in 1978. If a copyright decision was taken in 1938, then a strong copyright would have been granted on most elements of the story as it was not yet conventional; however, a copyright decision on Superman in 1990 based on the convention/modulation dichotomy would have given much less protection to some of the key elements of the comic/film because the features are now much more conventional. As with financial criteria for copyright, this suggests that a copyright that gives shorter periods of protection but which is renewable would be desirable as this would allow for a regular re-evaluation of the work. This could then reflect both its changing meaning and its changing economic status.

The second change suggested by Rotstein is a recalculation of what counts as infringement. Currently, copyright cases are decided on grounds of substantial similarity. This is looking for the similarity within the work itself. This follows a Romantic understanding that the meaning of the work is to be found inherent in the work itself. However, Rotstein argues that we should analyse texts in terms of their meanings for audiences –similarity should be a characteristic of the audience not of the work. He thus suggests that copyright cases should be based on the (real or supposed) responses of a ‘generically competent’ audience, which he defines as an ‘audience that has the necessary linguistic, generic and rhetorical competence to perceive and understand the codes at work in particular texts.’⁸⁴ There would be infringement in these cases if the generically competent audience deemed there to be substantially similar meaning attached to the two works (this has a resemblance to how trademark doctrine is supposed to exist to avoid consumer confusion). In this way, copyright infringement, rather than being based on substantial *similarity* becomes a question of substantial *familiarity*.

determine the competence of different people to make assessments. It is through genres that we experience music and musical relations, that we bring together the aesthetic and the ethical.’

While the changes suggested by Rotstein are a positive reflection of the public's role in the creation of meaning (and are to some extent practicable), they still treat the creation of meaning as something that the public does to an existing object. These solutions do not provide a reflection of the public's role in the initial creation of the work/object. For copyright to reflect this, it is my argument that there needs to be developed a positive notion of the public domain.

The public domain was created by the first copyright act, but has only been in copyright discourse for just over a century, gaining its first explicit mention in the Berne convention.⁸⁵ Other phrases such as the intellectual commons are roughly synonymous. Ross writes that the creation of the public domain enabled a nation's literary heritage to be owned by the people.⁸⁶ However, the public domain has only ever been defined negatively within copyright, as that which is not protected.⁸⁷ Samuels lists the type of works that traditionally have 'fallen into' the public domain. These include works for which copyright has lapsed; works in which copyright has been forfeited, either by accident or design; works ineligible for copyright; and elements of copyrightable works which cannot be copyrighted. Samuels argues that there never has been, and there is no point in having, a positive theory of the public domain.

Litman, however, has attempted to provide such a theory, stating 'the public domain is the law's primary safeguard of the raw material that makes authorship possible.'⁸⁸ She argues that copyright relies on the doctrine of originality to draw the boundary between the public domain and private property but, due to the traditional mode of creation (building on what went before), originality is impossible to ascertain (it is impossible to know whether one author subconsciously copied a work or whether another author did not). Thus 'the public domain is viewed as a commons that rescues us from our choice to grant fuzzy and overlapping property rights.'⁸⁹ Litman thus argues that the public domain is essential for the functioning of copyright because it is essential for authorship (there must be public domain works to build on if nothing is created out of nothing):

⁸⁴ Rotstein, 1993, p.784.

⁸⁵ Litman, 1990, fn.60.

⁸⁶ Ross, 1992, p.2.

⁸⁷ Samuels, 1993.

⁸⁸ Litman, 1990, p.967. This is strengthened by Frow who states 'public domain rights are those rights that, rather than deriving from personhood, precede and enable it. They are the rights to the raw materials of human life.' Frow, 1997, pp.214-215.

⁸⁹ Ibid., p.1012.

A broad public domain protects potential defendants from incurring liability through otherwise unavoidable copying. It protects would-be plaintiffs by relieving them of the impossible and unwelcome obligation to prove the actual originality of all elements of their works. It protects the copyright system by freeing it from the burden of deciding questions of ownership that it has no capacity to answer.⁹⁰

While Litman is correct to stress the importance of the public domain, it seems that she is not offering a positive justification for what should enter the public domain. Rather, I would suggest that we need to develop a system whereby copyright mandates the positioning of part of an ‘original’ work within the public domain from the very beginning of its life. This would have both an aesthetic and a financial element. Financially, a portion of the profits for a work could be siphoned off and used to support other artistic creation. Aesthetically, the author/publisher has to cede some of their rights to the public domain. This could reverse fair use logic by shifting the burden of proof onto the artist rather than the public. Also, borrowing from the precedent of patent law, the artist should have to explicitly state the breadth of rights that he seeks for the work. This would prevent the artist from blocking any new uses of the work that the public subsequently invents. By enabling some system of partial rights (for example, the right to use in creating a new work, or the right to create a play based on a novel) within the public domain, copyright would be a reflection of the processes of creation which does not prevent future authors from using existing works to create nor traditional authors from gaining some rights over their work. Thus the public domain is not viewed negatively - as that which cannot be copyrightable – but rather is viewed positively – as that which enables future authorship. As Yen points out

A vigorous public domain that contains original materials avoids the problem of unjust enrichment. Since practically every author would both owe and be owed compensation under a complete property rights scheme, it would seem eminently fair to simply abandon the futile task of trying to reach a perfect accounting of compensation among all authors. Instead, society could “balance the books” in a more equitable manner by forgiving many of the “debts” owed by modern authors to their predecessors. In return for this windfall, modern authors should forgive similar debts to future

⁹⁰ Ibid., p.969.

authors by dedicating some of their material to the public domain. In other words, the public domain would be used as a device through which authors could borrow from and compensate one another. The effect of this scheme would be to place even original material into a public domain.⁹¹

Along the same lines as Yen is arguing, I do not think the public domain should be defined merely as that to which no one owns the copyright. Rather I believe it is possible for a work to exist in the public domain (thus enabling widespread public usage) while at the same time maintaining some rights available to the author. In particular, the author should maintain the right to be paid for any commercial usage of his work (though not, I would argue, any non-commercial uses as these should be available to the public as a reflection of their role in the work's creation).

The effect of encouraging a positive public domain would be to ease the tension in the primary artist/secondary artist relationship. It would limit some (not all) rights of the creator of the work, but this would merely be a reflection of the previous work that she had borrowed to create and the social influence upon her creativity. It would also benefit the public as users of copyrighted material by preventing instances such as when, in August 1999, Twentieth Century Fox ordered a fan to remove from his web site the transcripts of *Buffy The Vampire Slayer* that he had transcribed himself as a homage to the show,⁹² or when Prince forced the closure of two web sites for infringing the copyright in his nomenclatorial squiggle.⁹³ By entering more original material into the public domain from its birth, the public would be able to adore it, manipulate it or redefine it and bootleg it by engaging freely with the text.

In this chapter, I have described some alternative methods of conceptualising creativity. Though I do not wholly endorse any of the three approaches discussed, I argue that the insights they offer regarding the production and consumption of meaningful commodities within the cultural industries may prove extremely useful for reconceptualising copyright in a manner that does not diminish the public right in copyright. Finally in this chapter, I looked at some general suggestions as to the practical form that copyright may take in light of these insights. In general, I argued for a positive public right in copyright that would primarily be characterised by a positive and expansive notion of the public domain.

⁹¹ Yen, 1994, p.168.

⁹² Walker, 2000.

⁹³ Message posted to the newsgroup rec.music.dylan by 'Judge Magney', 22 March 1999.

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Chapter 5

Romanticism and popular music

Duluth - where Baudelaire lived¹

I have so far argued that the regime of copyright has come to be dominated by a notion of artistic creation that can be characterised as Romanticism and have detailed the problems that such a notion creates. I have also argued that Romanticism is the dominant conception of creativity in modern society and have offered a few suggestions as to why this may be so. In the next chapter I shall discuss the functions that the figure of the Romantic author fulfils for the music industry and for copyright more generally. Before we can arrive at that point, however, in this chapter I shall give an example of the hegemony of Romantic beliefs in a modern setting by looking at how the ideas of Romanticism infuse rock music ideology. That rock music relies so heavily on Romantic and Bohemian ideals means that it provides an excellent example of the trends in copyright discussed so far as it provides concrete examples of the ideas that I shall discuss in the next chapter: if rock music can be said to take on the characteristics of nineteenth century Romanticism, then it is easier to see how the trends in copyright so far discussed have manifested themselves in a modern copyright industry. This chapter also provides an important foundation for the case study of bootlegging later in the thesis.

Note toward a definition of 'rock':

I am not aware of any watertight delineation of the categories of 'rock' and 'pop' within the academic discourse of popular music. These two terms symbolise the 'dialectic of authenticity and artifice' which is the subject of the current chapter.² Much of the thesis focuses on rock rather than pop, for reasons that will hopefully become clear (certainly bootlegging is concerned predominantly with rock music). However, to disengage rock from its symbiotic relationship with pop is to fall prey to the Romantic myths that are here under scrutiny. This point shall be discussed further below. In the

¹ Bob Dylan, sleeve notes to *Planet Waves*. Duluth was the town in Minnesota where Dylan was born.

² Frith and Horne, 1987, p.151.

meantime, some further points concerning the rock/pop dichotomy will be mentioned here, but the reader is advised to put imaginary ‘ ’ around every use of the terms.

The first large expansion of the postwar popular music industry came under the label of ‘rock’n roll’ in the mid fifties. This term had connotations of youth and, to some extent, rebellion. It was, however, a different type of youth from that worshipped by the Bohemians. Rock’n roll was linked to the development of the teenager as a powerful consumer group. It was a ‘teenage’ thing rather than a ‘youth’ thing. It was thus implicated in the artificial pop world, a fad of which teenagers would quickly tire. The teenager was without depth, giggly, easily excitable and easily distracted. This is distinct from the idea of youth venerated by nineteenth century Bohemians and 1960s rock musicians.

The idea of rock’n roll being merely a teenage commercial fad seemed well founded by 1958 as the first wave of rock’n roll excitement vitiated. From this time until the mid sixties, rock’n roll became synonymous with pop. The Beatles and The Rolling Stones would carelessly be referred to as both rock’n roll bands and pop groups. As the sixties developed, however, rock’n roll grew more serious and developed into the genre of rock. Rock began to differentiate itself from pop music and, as Frith and Horne point out, it is at this point that rock musicians begin to take on the ideology of nineteenth century Romanticism.³ At this juncture, rock’n roll began evolving into a specific term, meaning the period of music personified by Elvis in 1956 and 57 but it is worth noting though that when the ageing Stones (almost thirty!) were touring for the first time in three years in 1969, they billed themselves as ‘The greatest rock’n roll band in the world’ in order to maintain their association with youth.

In this chapter we are generally looking at an ideology of rock, but this leaves two important problems for our definitions. The first of these is geographical: the US and the UK are the two dominant rock nations. Laing suggests that over 50% of the world’s recorded music comes from the US and UK.⁴ However, there are significant differences between US and UK rock music. American rock music is viewed as a more democratic cultural form than its British equivalent. Rock stars are meant to have come from, and speak for, the working class.⁵ Bruce Springsteen is exemplar of the blue collar rock star. In the UK, artists speak only for themselves. A significant reason for this is in the UK, unlike the US, a significant number of rock stars went to art school.⁶ Similarly,

³ 1984, p.11.

⁴ 1993, p.31.

⁵ Frith and Horne, 1987, p.74.

⁶ Frith and Horne 1984, 1987; Walker 1987.

in the US the clichéd art/money antithesis is viewed less suspiciously than in the UK. The relationship between success and art is much more ambivalent in the UK, reflecting a more stereotypical Romantic attitude that good art and commercial taste rarely coincide.⁷

These differences in part reflect the different Romantic traditions that developed in both countries, and the two types of artist/public relationship characterised by Wordsworth that were discussed above. They do, however, pose a problem to any attempt to treat rock (as with Romanticism) as a homogeneous category. Yet by focussing upon the differences we may become blind to their shared features. There are enough similarities regarding Romanticism in rock music to draw out parallels between the two and these form the focus of this chapter. Also, the multinational character of the popular music industry today means that both US and UK rock musicians find themselves in a virtually identical industry structure.

The second issue is a historical one and perhaps poses a more serious threat to the current project. The currents of Romanticism within rock music developed in the mid to late sixties. What occurred in the early seventies, however, was that what was a fairly unified rock arena splintered into different genres such as Heavy Metal or Prog Rock. These different genres may make it difficult to talk of an overarching ideological rock approach; it may mean that rock music is now dominated by subcultural rather than Romantic ideas.⁸ The music industry of the twenty-first century has little in common with the industry of the mid eighties let alone the mid sixties. Do arguments regarding a Romantic ideology in early rock music still hold in the modern, digital environment?

To a great extent I believe that they do, in practice and ideologically. Firstly, many of the artists who rose to fame during the late sixties and early seventies are still in the music industry today, such as The Stones, Dylan, McCartney, Young and Bowie. These stars' attitudes have remained fairly consistent. If anything, their perceptions of being autonomous artists will have increased as they have achieved greater autonomy through their superstar status. What is also interesting is that it is these artists who most conform to the Romantic ideology that dominate the bootleg market. This relationship will be discussed further in the case study. Secondly, the new artists whose presence has been most felt by the industry in the eighties and nineties – Madonna, Prince and Oasis –

⁷ Stratton (1983) notes that labels will often use the ideology of 'good music doesn't sell well' as a prestige element for their roster.

⁸ The relationship between subcultural ideology and Romantic ideology is interesting as one should prove the antithesis of the other (if an artist is speaking from/for a subculture, it immediately undermines both the idea of the artist speaking for the whole of humanity and the idea that art is unattached to its social setting) yet within the record industry they seem to exist side by side.

also conform to the Romantic stereotype. One of the leading stars of the nineties, Kurt Cobain, achieved the ultimate Bohemian fulfilment – a dramatic suicide. Furthermore, the Romantic ideas that began in a roughly homogeneous rock have been carried into the different genres; it exists in Heavy Metal, in AOR, and in Britpop. The Romantic ideas have filtered down from the original stars to their more modern equivalents - Bowie has recently been voted by the most influential rock artist by current stars.⁹ Even in pop rather than rock, artistic autonomy is seen as important; the Spice Girls recently sacked their manager over their autonomy.¹⁰

As discussed earlier, the ideal of the Romantic artist is still the common sense notion of artistic creation, and the dominant practices of rock stars still meet the Bohemian ideal. And as mentioned in regard to Bohemianism, the myth of the Romantic artist is at least as important as the reality for our present purposes. If Romanticism supports the current copyright constellation, even if it contradicts current artistic practice and experience, then as long as the myth pervades, that is sufficient. In the remainder of this chapter I shall detail some of the most important similarities between Romanticism (and Bohemianism as characteristic of the artistic way of life) and rock music.

Romantic ideals in popular music

Although rock and Romanticism were about one hundred years apart, there are similarities in the social context of both Romanticism and rock. The first of these is a recognition of a change in audience. In the nineteenth century there was a growth of a large impersonal market; an intimidating mixture of the public and the people. We have already discussed the importance of the development of the market for the new conceptions of artistry. We have also briefly mentioned the change in audience for rock music; the development of the teenager. Before the advent of rock'n roll, parents and children tended to listen to the same type of music. However, the development of this new type of music is inconceivable without the changing consciousness of American youth and the institutionalisation of this consciousness led to a new relationship between stars and fans. Cohn argues that the reason that Elvis was so significant in popular music history was that, as well as proving the economic capacity of the teenage market, he gave rock'n roll an exclusively teenage property.¹¹

⁹ New Musical Express, 2/12/00.

¹⁰ Toynbee, 2000, p.31.

¹¹ Cohn, 1996, p16.

Another analogous social development between both times is the improvements in technology leading to the invention of new musical instruments. A new fingering system for woodwind instruments, the invention of valves on brass instruments, improvements in the piano and the invention of some lower brass instruments and the saxophone all occurred within music's Romantic era.¹² Prior to the rock era there is the invention of the microphone, crucial in developing the idea of the star. In the rock era, there is the first widespread use of the electric bass and piano and improvements to the electric guitar. The most important development, however, is the introduction of magnetic tape for recording. Not only did this make recording much cheaper, it also opened up new possibilities of using the studio to create a new musical soundscape.¹³ The studio became the most important tool of creation in the rock era.

Finally, both Romanticism and rock also followed what can be termed a period of classicism. The classical period prior to Romanticism is well documented and in music is characterised by Haydn or Mozart. Classical work was orderly and rational, appealing to the intellectual sense of structure. As the myth goes, Romanticism replaced this with an accenting on emotion. What is less recognised is that there was a comparable period of 'classicism' within popular music. Firstly within the Big Band era, with Duke Ellington appearing as the dominant artist whose work also held classical appeal, but more significantly in the workings of Tin Pan Alley (although Tin Pan Alley should probably be categorised as an ideal of craftsmanship rather than classicism). The idea of songwriting held by the writers in Tin Pan Alley was strictly governed by a set of rules regarding song structure, length of song and rhyming schemes. Many Tin Pan Alley writers initially would not write rock'n roll songs because they viewed them as too simple and uncrafted. Rock musicians (mainly of the sixties but a few in the fifties) challenged this by writing their own material (they also became the first performers to dictate how their material was recorded) and were reluctant to follow prior rules. This can be seen in the overturning of the rule that songs should not be longer than two and a half minutes, by the development of the six minute single 'Like A Rolling Stone' and the ten minute plus album tracks of the rock era. Similarly, the Romantic period in music doubled the length of a symphony from around twenty minutes to over forty minutes.¹⁴

There is thus a certain correlation between the social context of both rock and nineteenth century Romanticism. And it is immediately obvious that there are many areas of similarity between rock music and Romanticism. The obsession with youth,

¹² Greckel, 1979, p.196.

¹³ Toynbee, 2000, C3.

death, devils, whatever, all point to a simplistic relationship whereby rock music has, consciously or otherwise, modelled itself upon the great Romantics. There is a certain truth in this simplicity. Romanticism has become the dominant ideology regarding artistic creation and Bohemianism the dominant ideology of the artistic way of life. It is no great surprise that young people, given the chance to live out a creative lifestyle, follow this pattern. And there is a certain similarity between the participants of Bohemia and those of rock music, both being, to some extent, the bored children of the bourgeoisie. However, the relationship between rock and Romanticism is more complex than mere mimicry. Robert Pattison (1987) has argued that rock is a 'mutant variety of Romanticism'. He states: 'refined Romanticism stands to rock as Frankenstein to his monster... Rock [is] ignored or vilified by high-toned Romanticism, but nonetheless [is] the product of the same imaginative energies to which Romanticism pays homage in the abstract.'¹⁵

The mutation is described by Pattison as a turn to vulgarity, implicit in the pantheism of Romanticism but rejected by European Romantics because of their fear of the consequences. Pattison sees the pantheist spirit in Romanticism as inherently democratic and argues that it is in the American Romanticism of Walt Whitman that it comes to fruition. Pattison argues that pantheism has two possible consequences. The first of these, which he states is associated with the English Romantics, particularly Blake, is that only God exists and thus God is everything and I am He. This situates God at the centre of the universe. The second possibility, which he associates with Whitman, is that only I exist and He is I, therefore making the self the centre of all things. According to Pattison, the second approach is the 'more democratic and more commonsensical.'¹⁶ Whether or not this is so, it is certainly more American, and Pattison states that rock music, by taking on the democratic characteristics of Romanticism, is an American cultural form. His recognition of the democratic spirit of American rock music is accurate but this does not lead to the corollary that all rock music is democratic or that all rock music is American. In fact, the individual who exemplifies Pattison's characterisation of rock music (and Pattison recognises this) is English – Mick Jagger. He is also middle class, suburban and well educated - typical of the Bohemians but not so typical of the American democratic ideal. This early declaration from Pattison that rock is solely American is one of the problems of his whole thesis.

¹⁴ Greckel, 1979, p.197.

¹⁵ Pattison, 1987, p.187.

¹⁶ Ibid, p.113.

The reason that pantheism is more democratic, according to Pattison, is that it makes all things equal as all contain God (or I). Everything is equally common and equally good and thus the elitist boundary between refinement and vulgarity is dissolved: 'distinctions between right and wrong, high and low...disappear in pantheism's tolerant and eclectic one that refuses to scorn any particular of the many.'¹⁷ Once the distinction has been eliminated then democratic popular artforms can arise. The cultural form of rock is one case, and it is vulgar. But as the distinction between high and low has been extinguished, vulgar is not a pejorative term. Pattison argues correctly that rock music can never be a respectable artform and that those who try and defend rock in respectable terms will never succeed.¹⁸ Furthermore, he argues that the defence of rock music is to be found in Romantic pantheism. However, he seems stuck in the track of defending something aesthetically on the grounds of its popularity¹⁹ – he is very critical of 'Marxist' critics who express the view that popular artforms are not the result of the free choices of individuals. His whole approach seems to adopt a postmodern relativism and his linkage of pantheism with democracy ignores the material basis of the struggle for aesthetic judgement. While high cultural judgements have their own obvious class basis in the aristocracy, it would be dangerous to assume that the more 'democratic' cultural judgements are universal.²⁰ This tension can be seen demonstrated by Wordsworth's contradictory emotions toward the 'public' and the 'people'. Wordsworth's initial optimism about the democracy of new art forms gave way to horror as the public were distracted from the benefits of high art towards lighter pastimes. This is the European Romantic attitude to vulgarity that Pattison scorns, but in so doing his idea of pantheism flattens all culture. If all things are equally special then all things are equally mundane and we have no way of judging the value of a work other than popularity.²¹ We are similarly left with no way of determining whether and why some individuals are more

¹⁷ Ibid, p.23.

¹⁸ This approach is repeated often. Tom Carson, in his article on The Ramones states 'One of the chief delights of rock 'n' roll is that it's trash music for a trash culture; when Chuck Berry wrote down his version of the American dream, it wasn't any chaste pastoral grandeur he chose to mythologize, but jukeboxes and hamburgers and neon. What makes music liberating is that it's resolutely not respectable.' Carson, 1990, p.445.

¹⁹ This type of approach is criticised by Frith, (1991), 'The good, the bad and the indifferent: defending popular culture from the populists', *Diacritics* 21:4, pp.102-115.

²⁰ Pattison here shares a similarity with Hughes' argument discussed in chapter 3. One reason that Hughes argues against the importance of Romanticism in copyright law is that he believes that Romanticism is elitist and does not reflect the democratising nature of copyright. Pattison here is also arguing against the elitism of Romanticism, stating that the 'democratic' conception of pantheism is more in tune with rock music.

²¹ Perhaps your viewpoint depends whether you have been taking stimulants or depressants. Lou Reed presented an image of himself that he had become so deadened by smack that he was a totally disinterested observer of all in front of him (and was never too impressed with what he saw.)

prone to see the specialness of these objects. This is of course the traditional Romantic view and Pattison would reject it as either 'European', 'Marxist' or 'sociological', the three most damning adjectives in Pattison's vocabulary.

Regardless of the problems of Pattison's postmodern relativism, his thesis does leave us with some important points. The first of these is that the 'Romanticism' of rock music is not a straight transposition of nineteenth century Romanticism into the twentieth. It would be remarkable if it was as the social context of both developments is different. Secondly, rock music posits itself against Romanticism because it posits itself against high art, or rather the canonisation of high art.²² In this sense rock music is more directly influenced by Modernism than Romanticism.²³ Finally, in his focus on rock music as a democratic form, he opens up an interesting dialectic of rock music. While it is true that there are certain democratic currents running through rock music (such as the blue collar rocker in America or the punk explosion in the UK), there are equally currents in rock that position the rock star as a special creative individual speaking only for him or herself (such as artists like Bowie and Ferry in the UK or the New York punk movement of the mid seventies²⁴). Even those who are not within either current would, I imagine, view themselves as creative individuals who are 'not like everybody else.'²⁵ Pattison also gives us substantive detail on some of the key Romantic concepts in rock music, and it is these to which we now turn.

The key Romantic strands in rock music are: authenticity; the dominance of feeling over rationality; an idealisation of the primitive and folk culture; a detestation of the ordinary (bourgeois); and hedonistic excess. These more fundamental features lead onto formalistic similarities between the two concerning: youth; ennui; the macabre; nature; dandyism; and political apathy.

'Authenticity' is the key idea of rock music. Taylor argues that authenticity is one of the central organising principles of modern society. He states that authenticity is a 'child of the Romantic period' and states that authenticity is a 'moral ideal'.²⁶ Taylor defines this moral ideal:

²² Johnny Rotten: 'I hate art. It's treating something that's supposed to be good as precious.' Quoted in Pattison, 1987, p.135.

²³ Notwithstanding that Modernism was the apotheosis of Romantic ideals of internal creativity. There is no doubt that much British rock music was influenced by dada and situationism, or that 60s US rock was influenced by surrealism.

²⁴ Although the New York movement contained both currents, the democratic Ramones and the artiness of Patti Smith and Television.

²⁵ The Kinks, 'I'm not like everybody else' (B-Side to 'Sunny Afternoon'), 1966.

²⁶ Taylor, 1993, p.25; p.15.

Herder put forward the idea that each of us has an original way of being human...This idea has entered very deep into modern consciousness. It is also new. Before the late eighteenth century no one thought that the differences between human beings had this kind of moral significance. There is a certain kind of way of being human that is *my* way. I am called upon to live my life in this way, and not in imitation of anyone else's. But this gives a new importance to being true to myself. If I am not, I miss the point of my life, I miss the point of what being human is for *me*.²⁷

Authenticity is necessary as a moral ideal because the forces of modern society lead us to view things, and thus ourselves, instrumentally.

[Authenticity] accords crucial moral importance to a kind of contact with myself, with my own inner nature, which it sees as in danger of being lost, partly through the pressures toward outward conformity, but also because in taking an instrumental stance to myself, I may have lost the capacity to listen to this inner voice. And then it greatly increases the importance of this self-contact by introducing the principle of originality: each of our voices has something of its own to say...Being true to myself means being true to my own originality.²⁸

This understanding was described in the section on Bohemianism and Taylor views it of great significance. Let us now return to popular music, however. Rock music is characterised as authentic against the artificiality of pop music. At its most blunt, this authenticity means a lack of concern, indeed an antipathy, toward the commercial side of the popular music industry. 'Authentic' artists are supposed to shun the publicity machine and write what is true to themselves rather than writing what they think will be popular. This tirade from Heylin is as good an account as any of the accepted split between artistic and financial concerns in rock music:

The question of profit is one big bloated herring, more puce than red. WHO GIVES A FLYING FUCK if the artist doesn't get mucho denarii? The artists certainly shouldn't because – its [sic] q.e.d time – if they did, they

²⁷ Ibid., pp.28-29. Emphasis in original.

²⁸ Ibid., p.29.

wouldn't be artists. Huh? Run that by me again. I'm saying that if an "artiste" is more worried about being paid for a live performance put down on permanent record THAN allowing the pleasure of hearing that performance to his fan [sic] around the world, then I doubt that he is an artist – he certainly is no longer focusing on his art. He has become a charlatan and a hypocrite.²⁹

Pop music, according to this ideology, is crassly commercial and is there merely to shift units. The authentic artist is one who lives up to the ideals of the Romantic artist- the free, creative, alienated genius. Within the popular framework there is a juxtaposition between the artist and the industry. For an artist to be authentic, he must not be concerned with financial matters but only create what is true for him. This quote from a Springsteen fan about why they like him is illustrative:

I've always liked his music and I've always respected him as an honest musician because he wrote what he felt like. I always thought that he didn't write what he thought people wanted to hear. He wrote what he felt like...I always thought that he was honest and true to his music. That his music came to him first, before what he might have thought his fans would have liked him to do. And that I respect.³⁰

The artist characterises the predominance of feeling and experience, instinct, hedonism and creativity while the industry characterises the iron cage of rationality, commercialism and commodification. This is the myth of Romanticism in its current context.

There are two ways in which the rock star attempts to prove his or her authenticity. The first of these is by being anti-commercial and anti-technology. The second is by being true to the black origins of rock music. Both of these reflect the primary emphasis on feeling rather than reason in Romanticism. When Pattison argues that rock music cannot be made respectable, what he is really arguing is that it cannot be defended by reason. Rock music is instinctual, about the body not the head. The primacy of feeling is actualised in the primacy of dance.

²⁹ Heylin, 'An open letter to tape collectors' Live! Music Review June 1997.

³⁰ Quoted in Cavicchi, 1998, p.58.

Stratton's study of rock reviewers reveals how the victory of feeling over reason is perpetuated in rock.³¹ Critics are in a middle position between the industry and the fan. They are, however, keen to distance themselves from the industry (primarily so that fans will view their reviews as unprejudiced by market concerns, but also because of their own assumptions of artistic creation). They face a dilemma because to attempt to rationally critique the music destroys the *modus operandi* of rock. To escape from this dilemma, the reviewers revert to a generalised view that there is a level of non-rational feeling which affects us all. If this is enunciated, Stratton argues, it would be destroyed because it is obviously untrue, but it is never expressed and thus never challenged.³² The first stage of a review is whether the music makes the reviewer want to move:

Well...it's a very complicated procedure um, one is a purely instinctive reaction, if I put on a record and get up and dance, that tells me a lot about the record, because it means that I physically react to it and that I get an immediate enjoyment out of it...³³

However, if a reviewer has to review a type of music which she does not like, for instance heavy metal, then she has no choice but to rely on analysis. However, the analysis is on the level of the relationship between the artist and the music (does it achieve what it sets out to do?) and audience and music (will it make the audience move?). The analysis is not a detailed, rational discussion of the music, but on the feelings of the people involved. Stratton concludes that

...it is the fear of the intrusion of analysis, indeed of capitalism, which demands the emphasis on emotion... Interestingly it does not cause a problem precisely because the separation is so complete. Analysis, because it plays no part in the elaboration of aesthetic criteria in rock and roll, may be safely left to the commercial, capitalist side of the industry.³⁴

This shall be returned to in the next chapter.

The desire for authenticity results in the preference in rock music for live performance rather than studio recordings. This is important in the analysis of

³¹ Stratton, 1982.

³² Ibid., 1982, p.278.

³³ Quoted in *ibid.*, p.279.

³⁴ Ibid., p.281.

bootlegging, as most bootlegs are of live shows. If we think of authenticity as being the opposite of distantiation in music (thus offering a direct link between artist and audience), we can see why this should be so. The following quote is typical: 'live performances have always been the most intense, most revealing experiences in pop music. That's where you can tell if an artist can really sing, really make you dance, really deliver an unfaked emotion or epiphany to a breathing audience.'³⁵ Cavicchi writes of Springsteen's live performances; 'Springsteen's relationship with his audience tends to collapse the performer – audience boundaries and corporate – consumer divisions that have been prevalent in much of rock history.'³⁶ Thus because Springsteen is the archetypal live performer, he is more authentic because he is closer to his audience and he appears on the art side of the art/commerce divide.

The popular conception of the music industry is one in which the artist's music is distanced (alienated) from them by the process of commodification, recreating the crude artist/industry dichotomy. The further down the production chain the work goes (i.e. the more it transforms from individualised music to alienated commodity form), the greater the emotional distance between the artist and his music. 'Authentic' music is that in which there is no emotional distance between them. Playing music live eliminates the distance between artist and music and between artist and fan. It thus provides the 'truest' way of playing music. 'Playing live' exists in two senses; playing on stage, but also the idea of playing live in the studio (meaning that a group all play their instruments in the same room at the same time as if they were playing together on stage). Modern studio technology has led to a situation whereby most bands do not record their albums live, but rather a series of different tracks and overdubs add distance to the original recording.³⁷ Multitrack recording now means that many bands are not in the room together when they record (they are sometimes not in the same country). One reason why bands from the sixties are viewed as more authentic than nineties bands is that they cut records live in the studio.

Mention of studio technology brings up the wider issue of authenticity being anti-technology as well as anti-commerce. This is primarily because technology is associated with the rational, capitalistic side of the industry – the technology that serves as an assistance to artists, such as the electricity that enabled Muddy Waters and Howlin'

³⁵ Geoffrey Himes, *Voice Pazz and Jop Supplement* 5/3/91, p.7. Quoted in Frith, 1998, p.68.

³⁶ 1998, p.14.

³⁷ Overdubs have existed since the sixties and they were utilised by bands in that decade also. The increasing sophistication of studio technology, however, has decreased the incidence of recording songs live and this has exacerbated the ideological antimony of authenticity and studio technology.

Wolf to develop the Chicago blues sound, is overlooked.³⁸ Ironically, it is technology that enabled the idea of authenticity in rock music in the first place through both the development of the microphone (which enabled singers to be more intimate with their style) and the development of recording itself (which enabled the singer to become the author of a song through sound rather than the songwriter through the printed score.)³⁹ However, new technology also allowed new soundscapes that did not depend on playing live to develop and because of this there is an 'implication that technology is somehow false or falsifying.'⁴⁰ Frith points out three ways that this is perpetuated: firstly that technology is opposed to nature – the invention of the microphone, or the multitrack studio meant that the new singing style or the new way of recording was unnatural; secondly that technology is opposed to community – electric amplification alienates the performer from the audience and splits the democratic nature of music;⁴¹ finally that technology is opposed to art – machines such as drum machines take the place of real people in music making, and they can be programmed to play, removing the possibility of that Romantic moment of inspiration from music making – the 'feel' of rock is destroyed.⁴²

So the first way for a musician to be authentic is by being anti-technology and anti-capitalist. The second way a musician can be authentic, discussed in detail by Pattison, is by maintaining an allegiance to the black roots of rock music.⁴³ This is in keeping with the Romantics' fascination with the ideal of the primitive: the first annunciations of the noble savage were by Rousseau who saw all humans as naturally good and dignified until compromised by society. By the time of Nietzsche, the human was seen as a wilful animal but within this animalism lay his highest nobility. African blackness has been used as the canvas on which to portray the very best or very worst of human nature. It is this later signification – the primitive humanity, unsullied by

³⁸ Frith (1986, pp.272-275) points out that technological change has actually been a source of resistance to the capitalist side of the industry. Those technologies that have taken off, such as the home tape recorder, and latterly MP3, are those that allow for the decentralisation of the ownership of music. Those that fail, such as the video disc are those that do not allow a degree of control of the ownership of the music. The one very notable exception to this is of course the CD, which took off despite the fact that it did not allow any way into control of the music.

³⁹ Ibid, pp.269-272. See also Toynbee, 2000, pp.68-75.

⁴⁰ Ibid, p.265.

⁴¹ This was the basis of the furore over Bob Dylan 'going electric' in 1965. See Greil Marcus (1997), *Invisible Republic: Bob Dylan's Basement Tapes*, Picador, London.

⁴² Frith points out that the artist must be seen to be making an effort in his creativity, and this is why people who play electronic music are dismissed as inauthentic. There is a parallel here with early attitudes to photography, which was viewed as not being an artform because the machine not the person was actually achieving the representation.

⁴³ 1997, C2&C3.

civilisation - that was adopted by rock music so that ‘blackness was a virtue’.⁴⁴
Blackness implies natural feeling, an instinctiveness not washed out by the technology,
the rationality, the suburbia of the bourgeoisie:

I wanna be black, have natural rhythm
.....
I don’t wanna be a fucked up
Middle class college student anymore⁴⁵

At lilac evening I walked with every muscle aching among the lights of 27th
and Welton in the Denver coloured section, wishing I were a Negro, feeling
that the best the white world had offered me was not enough ecstasy for me,
not enough life, joy, kicks, darkness, music, not enough night. I wished I
were a Denver Mexican, or even a poor overworked Jap, anything but what I
so drearily was, a ‘white man’ disillusioned.⁴⁶

The basis of rock music is the blues. The legend of the development of rock music is that
the noble savages, forcibly brought into the new world as slaves, brought their exotic
rhythmic music with them and it became their only refuge from the cruelty of their new
existence. The blues is the authentic howl from pain of the victim of a barbaric society. It
is the voice of the displaced and dispossessed African experience. Slave owners were at
once enchanted and repelled by what they heard. They commented upon how uplifting
the slaves found their music but were fearful of its revolutionary potential. But it was
most certainly a music only for the blacks. And up until the 1950s this was
institutionalised in America by separate charts for white and black music.

Blackness signifies the dominance of instinct above reason, the ‘natural rhythm’
that is the feeling at the base of all rock/black music. It is fundamental to all the songs
that detail an inescapable rhythm that takes hold of you and means you cannot but dance.
The opposite pole was the warnings from the white parents who denounced the
uncontrollable convulsions of those in the grip of rock’n roll - it was the devil’s music.
Both of these are the same view of the role of blackness in that uncontrollable rhythm, it
is just that one takes a bohemian judgement of it, the other bourgeois.

⁴⁴ Bob Dylan, ‘Shelter from the storm’ (from the album *Blood on the Tracks*), 1975.
⁴⁵ Lou Reed, ‘I wanna be black’ (from the album *Street Hassle*), 1978.
⁴⁶ Jack Kerouac, *On the Road*, 1949.

Although most fifties and early sixties pop adopted the beat of rock'n roll and thus were influenced by black music, the real black influence was in the heavyweights of the first rock'n roll wave (Elvis, Buddy Holly, Little Richard, Chuck Berry. All came from the South) and in the explosion of bands in the sixties in the UK. All of these bands (The Beatles, The Stones, The Kinks, The Yardbirds, Them) worshipped the blues and its creators. The blues was the route to a universal truth and it didn't matter if you were a spotty teenager from Clapham, this music from the southern United States touched a common humanity that you shared with Mississippi John Hurt. This is an entirely Romantic understanding. These blues players also filled the Romantic stereotype of the artist perfectly. Not a lot was known about them, but they were poor and dispossessed. They probably drank and had sex a lot. There was certainly a lot of sex in the records. It is little coincidence that the blues artist who most fits the Romantic stereotype (sold his soul to the devil, womaniser, heavy drinker, mysterious, dead at 26 – allegedly by shooting, poisoning and drowning) is the most venerated blues artist of all time – Robert Johnson.⁴⁷

The following quote is from The Rolling Stones' official biography in 1964. It focuses upon the 'feelingness' of the blues, a shared heritage between the Stones and the bluesmen ('the worst of times') and, for good measure, their anti-commercialism. How authentic can you get?

The Stones picked up Rhythm'n'Blues, grappled with it, learned to 'feel' it. And once they'd made up their minds to stick with it, through the worst of times, nothing could shake them from their resolution. They were determined to express themselves freely, through their music.

And they decided unanimously that they were going to make no concessions to the demands of the commercialism that they frankly, openly, despised.⁴⁸

These two concepts of authenticity: as anti-commercialism, anti-technology and anti-rationality; and as adherence to one's black roots (or rock's black roots) are the two fundamental ideological strands running through rock music. Other important ideas borrowed from Romanticism are a detestation of the ordinary and hedonistic excess.

⁴⁷ It is notable that the greatest Romantic authors of both literature and blues (Shakespeare and Robert Johnson) were both figures whose biographies were little known. This enabled subsequent writers to place their own Romantic stereotypes upon the characters. For a relevant discussion on Shakespeare, see Boyle, 1988.

As already discussed, the Bohemians positioned themselves against the bourgeois. The bourgeois became the focal point for all their hatred as they personified the new utilitarian order. They had no taste, no passion and were concerned solely with material accumulation. The concept of the bourgeois may not have gained much currency in rock music, but everything that the bourgeois stood for is still detested. Rock music rails against the mundane, the stifling and the ordinary. In the early days of rock'n roll, the mundane was associated with school, such as Chuck Berry's *School Days*. While school is still an institution railed against in some rock music (it is the institutional opposite to the freedom offered by rock), it has developed further to include the anathema of the boring job (or boring unemployment in the case of English punk):

I was looking for a job and then I found a job
And Heaven knows I'm miserable now⁴⁹

Nothing to do
Nowhere to go
I wanna be sedated⁵⁰

In England, 60s bands like The Stones (*Mother's Little Helper*) and The Kinks (*Well Respected Man* among others) right up to current bands like Blur (*Charmless Man* and many more) and Pulp (*Disco 2000*) have lambasted suburban England. The attitudes of the suburbs, as those of the bourgeois, are stultifying, cautious, accumulative. They are the opposite of rock's recklessness. Rock's term to describe the bourgeois was the square. The square exists in the Beat movement of the fifties and Becker, in his studies of jazz musicians, highlights how they define themselves (as hip) against the square.

The system of beliefs about what musicians are and what audiences are is summed up in a word used by musicians to refer to outsiders – "square." It is used as a noun and as an adjective, denoting both a kind of person and a quality of behaviour and objects. The term refers to a kind of person who is the opposite of all the musician is, or should be, and a way of thinking,

⁴⁸ The Rolling Stones, *Our Own Story*, Corgi, London, 1964. Quoted in Frith, 1986, p.266.

⁴⁹ The Smiths, 'Heaven Knows I'm miserable now' (single), 1984.

⁵⁰ The Ramones, 'I wanna be sedated' (from the album *Road to Ruin*), 1978.

feeling, and behaving (with its expression in material objects) which is the opposite of that valued by musicians.

The musician is conceived of as an artist who possesses a mysterious artistic gift setting him apart from all other people. Possessing this gift he should be free from control by outsiders who lack it. The gift is something which cannot be acquired through education; the outsider, therefore, can never become a member of the group. A trombone player said, “you can’t teach a guy to have a beat. Either he’s got one or he hasn’t. if he hasn’t got it, you can’t teach it to him.”⁵¹

Although the language has changed, the rock musician (indeed, the rock fan) is still engaged in this classic juxtaposition. Rock music, and rock musicians, colour an otherwise grey, bourgeois, world.

The Romantics believed that excess was the way to break through the confines of our social world and be in touch with either our individual selves or the pantheistic God. Blake wrote ‘The road of excess leads to the palace of wisdom.’ This was updated by Pulp to

Before you enter the palace of wisdom
You have to decide are you ready to rock.⁵²

We have already noted the excesses of the Romantics and the Bohemians in the development of the myth and rock music has become famed for similar excesses.⁵³ So much so that it seems futile in offering up a list to prove the argument. I shall thus limit myself to one or two comments.

The first of these involves sexual excess. Romanticism has been linked with sexual excess since Byron, whose ‘retreat from England in 1816, pursued by rumours of

⁵¹ Becker, 1963, pp.57-58.

⁵² Pulp, ‘Party Hard’ (from the album *This is Hardcore*), 1998. The song is actually an ironic comment on the hedonism ordinary people use to prove they are not square. The song includes ‘Why do we have to half kill ourselves/Just to prove we’re alive?...And do you really want to know/Just how come/You turned out so dumb?’ This is reminiscent of British Romantic attitudes to the people’s use of hedonism: both Wordsworth and Coleridge were horrified at the possibilities of unenlightened hedonism by the masses.

⁵³ In March 2000, the UK music paper Melody Maker issued a poll of ‘rock and roll hellraisers’. The editor of Melody Maker stated ‘Their antics read like a litany of sexual deviance, drug-fuelled escapades, self-abuse and mutilation.’ As it was a public poll it obviously had a contemporary bias, but the fact that seven of the top ten were from nineties bands indicates that the Bohemian myth of rock music has not yet disappeared. See Will Woodward, ‘Gallagher pips Robbie Williams in hellraisers’ list’, *The Guardian* 21/3/00.

his sexual mistreatment of his wife and even of his incest with his half-sister, identified him for all time in the popular mind with his Satanic, guilt-ridden creations.’⁵⁴ The most famous rock stars (for example Jagger, Prince or Jim Morrison) have a mythical sexual potency. But the pantheistic sexual excesses of the Romantics have been trivialised by rock. The playfulness and irony of sex in blues music became distorted into the ‘cock rock’ of the seventies. Although some blues lyrics can be accused of sexism, there is a plane of the blues that accepts the female of the song as a real person with real feelings. By the mid 1970s, the female was merely a necessary receptacle for intercourse, with album titles such as *Penetrator* and *Slide it In*.⁵⁵ Charles Sharr Murray details the transformation of Muddy Waters *You Need Love* (which Murray describes as ‘mildly condescending and vaguely paternalistic, although “avuncular” is probably a more appropriate adjective’) into Led Zeppelin’s *Whole Lotta Love* which Murray characterises as coming on like ‘thermonuclear gang rape’⁵⁶

Way, way down inside, I'm gonna give you my love,
I'm gonna give you every inch of my love⁵⁷

Sex was viewed as important in the Romantic era because it is one of the primary ways of casting off self-limitation to grasp the infinite. Interestingly, this was one of the main themes of the Hippy ‘free-love’ of the late sixties.⁵⁸ Sex has lost such pretensions in rock, however. Sex is viewed as important in rock mythology because a) it’s fun b) it is associated with youth (at least by youth themselves) and c) it is the primary instinct, and thus pre-rationality. Sex is trivialised in rock music because it has little to do with real desire and more to do with the celebration of the instinctual (and a healthy dose of masculine posturing). Thus, while genuine passion is rarely humorous, rock’s sexuality is predominantly so (in a smirking, sexist, kind of way).⁵⁹ The symbol of rock’s trivialisation of sex, and of rock’s vulgarity is its penis worship, lampooned in the film *This is Spinal Tap*:

⁵⁴ Butler, 1981, pp.2-3. He probably got a similar reception in England as Jerry Lee Lewis when the press discovered he had a thirteen year old bride.

⁵⁵ By Ted Nugent and Whitesnake respectively (both 1984).

⁵⁶ Murray, 1989, p.60.

⁵⁷ Led Zeppelin, ‘Whole Lotta Love’ (from the album *Led Zeppelin 2*), 1969.

⁵⁸ Another key feature of the Hippy movement was the use of stimulant drugs, particularly acid, to see the infinite. Ideologically, this period of rock history is most in tune with Romanticism and is often used as the rock caricature.

⁵⁹ Pattison, 1987, pp.115-120. Rock critic Paul Williams suggests only two rock singers who can ‘sing about desire without trivializing it’ – Dylan and Prince (Paul Williams, *Watching the river flow*, Omnibus, London, 1996, p193.)

[Female fans] are really quite fearful, that's my theory. They see us on stage with tight trousers and we've got, you know, armadillos in our trousers. I mean, it's really quite frightening, the size. They run screaming.⁶⁰

A famous early groupie gang, the Plaster Casters used to make casts of their rock stars' genitalia. As Pattison states 'nothing has done more to persuade polite opinion of the subversive vulgarity of rock than its penis worship.'⁶¹

There are many other similarities between Bohemia and rock. One of these is an idolisation of youth, epitomised by the aphorism

Hope I die before I get old⁶²

Romanticism created the linkage of youth and genius, characterised by the early deaths of Keats, Shelley and Byron.⁶³ This developed into an idealisation of youth in nineteenth century Bohemia and rock has continued the trend, developing from a teenage form to a youthful one. Campbell argues that the Bohemian role in society has been institutionalised into that of Youth, particularly the student.⁶⁴ Youth in modern society is seen as the time of experimentation and excess but, like Rodolphe in Murger's play, they must eventually cede that life to become hard working citizens. This trait may seem strained for rock music when so many rock stars of the sixties and seventies are still around. However, the fact that a band such as the Stones are viewed as an anachronism by the popular music press indicates that rock is still viewed as a young person's field. Also, the link between youth and excitement in Bohemia has been subverted by rock so that youth is defined by excitement rather than years. Rock is one way to guarantee eternal youth, because the rock lifestyle makes one youthful. Witness the number of ageing rockers with very young girlfriends.

Many of the most famous rock stars died young, creating a frozen image of themselves to be immortalised in youth.⁶⁵ It is quite conceivable that they are the most

⁶⁰ 'Nigel Tufnel', lead guitarist of Spinal Tap in 'This is Spinal Tap' dir. Rob Reiner, 1984.

⁶¹ 1987, pp.115. This suggests another similarity between rock and Romanticism: they are both almost exclusively male domains.

⁶² The Who, 'My Generation' (single) 1965.

⁶³ Parrinder, 1977, p.44.

⁶⁴ 1987, p.224.

⁶⁵ The post-war prototype for this was actually a movie star, James Dean, but it has since become the prerogative of the rock elite: Buddy Holly, Brian Jones, Keith Moon, Jimi Hendrix, Janis Joplin, Jim Morrison, Kurt Cobain....

famous rock stars because they fulfilled the Bohemian ideal. The cliché of a short, creative life ended in dramatic style (true rock stars do not die by natural causes) is a Romantic cliché where they

Live hard, die young,
Have a good looking corpse every time.⁶⁶

This leads to another similarity between rock and Romanticism: death, suicide and the macabre. Death is part of the rock hero's associates, although as with the Suicide Club, there haven't been that many suicides in rock (Sid Vicious and Kurt Cobain being the honourable exceptions).⁶⁷ The associations with the macabre are, as with the Parisian Bohemians, part of a desire to shock the middle class sensibility through an 'infatuation with vice, poison, rape, murder and blasphemy.'⁶⁸ However, it was only a surface interest. Benjamin writes that 'Baudelaire's Satanism must not be taken too seriously.'⁶⁹ About as seriously as Mick Jagger's perhaps? The Stones 'Satanism' actually took inspiration from Baudelaire; *Sympathy for the Devil* being influenced by the '*Fleur des mal*'.⁷⁰ Rock music has often been characterised as the devil's music and this highlights a further similarity with Bohemia –secularism.

There are many similarities between Romanticism/Bohemianism and rock music and this chapter has just touched on some of the more obvious ones. In fact, it is quite possible to argue that the latter was built on the ideological foundations of the former. To do this, however, it is necessary to look beyond the formal similarities between the two and look at the underlying notions of artistry. Rock's notions of authenticity stem from its basis in Romantic ideals that I have outlined here. In the next chapter, I shall discuss how these Romantic ideals have proved useful to the popular music industry and how Romanticism fulfils certain functions for capital in the sphere of copyright.

⁶⁶ Tom Waits, 'Mr. Siegel' (from the album *Heartattack and Vine*) 1980.

⁶⁷ The Suicide Club was established in the Sorbonne in 1846 for anguished artists who wished to make the ultimate protest against the social order. There were strict rules about motives for suicide: those who wished to end it all because of a failed romance, financial difficulties or incurable disease were refused membership. It also prohibited any suicide method that would cause disfiguration. In total, the club registered one suicide. Grana, 1964, pp.79-80.

⁶⁸ A contemporary observer, quoted in Grana, p.75. This list could act as a roll call for the central features of the Rolling Stones' most significant records.

⁶⁹ Benjamin, 1997, p.23.

⁷⁰ Mick Jagger, in '25x5: The continuing adventures of the Rolling Stones' video, 1989.

Chapter 6

Romanticism, copyright and the music industry

*I am an artist and I should be exempt from shit.*¹

It has thus far been shown that it is impossible to fully understand either copyright or rock music without recourse to ideas that developed in a mutated form out of the more complex ideas of the Romantics. This is no real surprise: it is not just these spheres of public life which utilise a Romantic spirit; rather it is the dominant perception of artistry and individuality in all areas of society. Romanticism is still ‘central to modern culture.’² However, an important reason that these beliefs have become so deeply rooted in our consciousness, and so deeply embedded in the rhetoric and practice of copyright and rock music, is that they assist capitalist enterprises in their profit maximising activities. The ideology of Romanticism is promoted by those in the popular music industry as a means of achieving certain strategic aims. Though the industry has certain idiosyncrasies, this is fairly representative of the way that Romantic ideas are (and have been) used by publishers to achieve their strategic aims throughout copyright’s history. In short, Romanticism fulfils a number of functions for publishers in copyright.

A word, however, on such ‘functions’. I am not suggesting that Romanticism ‘works’ for copyright in any structural-functionalist or structural-Marxist sense. Rather, I am saying that the ideas characterised by Romanticism are utilised in day to day activity by publishing corporations as the primary means of attaining their aims of a) maximising copyright protection (which greatly assists in) b) maximising profit. Neither is this conceptualisation instrumentalism: the ideas of Romanticism *are* manipulated by publishers and record labels but the ideology is not a top down imposition: the reason that Romanticism is so successful an ideology for these strategic aims is that it is the hegemonic way of understanding artistic creation. As Frith states with regard to popular music, ‘capitalist control of popular music rests...on... its recurring appropriation of fans’ and musicians’ ideology of art.’³ Romanticism ‘works’ for publishers because it is an ideology shared not only by capitalists but also by legislators, judges and the public. This is why Romanticism is the most important means of achieving these strategic aims,

¹ PJ Proby, quoted in Cohn, 1996, p.194.

² Taylor, 1989, p.419.

³ 1986, p.287.

even though it is not the only means, and even though it works in ways often antithetical to capitalists' strategic aims.

With these words of caution in mind, in this chapter I shall look at the 'functions' of Romanticism. Firstly, I shall discuss some of the reasons why Romanticism is so prevalent within the rock music industry, arguing that it is a primary way that the record labels attempt to instil some predictability and stability in the industry. Following this, I will go on to discuss how Romanticism helps capital disguise the process of commodification that occurs within the cultural industries before taking these insights into a discussion of the functions of Romanticism for copyright more generally.

The functions of Romanticism for the music industry

The popular music industry is a culture industry. This means that while it has certain idiosyncrasies from being a producer of primarily immaterial products, it is still organised around the maximisation of profit. The record company must seek to maximise the profit making records it releases (the hits) while minimising the number of loss making records it releases (the flops). However, the music industry is characterised by its unpredictability: despite the industry's desire for a rational approach to the prediction of hits and flops (which would thus enable the elimination of flops), the record industry is unstable as consumer preferences are particularly difficult to predict. The majority of records released do not make a profit; according to the RIAA only 15% of records do so.⁴ These few hits have to generate enough income to cover the losses of the other records and still return a profit to the company. The record labels therefore seek to adopt rationalising strategies to limit the unpredictability of the market.

According to Hirsch (1972), the record industry initiates three different strategies to attempt to stabilise the predictability of the industry. The strategies are: the 'proliferation of contact men', meaning the granting of an occupational autonomy to people in specialist areas in the industry; the co-option of 'institutional regulators' such as radio and pop magazines, which are crucial in determining what is a hit; and finally through a process of overproduction and differential promotion. These strategies help establish the key structural features of the music industry. The argument that I am putting in this chapter is that the ideology of Romanticism is a key institutional feature

⁴ Source: <http://www.riaa.com/Protect-Campaign-3.cfm> (visited 15/12/00). This figure should be treated with caution as it can be in the label's interest to downplay the profitability of a record to minimise the amount of royalties it pays to an artist. It does, however, offer a rough indication of the level of unpredictability in the music industry.

of the music industry that assists the rationalisation process. The beliefs about art and artists characterised as Romanticism, which are so prevalent in the music industry, serve a number of key functions which the industry uses to stabilise its unpredictability.

The first function of Romanticism can be described as ‘risk sharing’. Toynbee has characterised the structure of the music industry as incorporating ‘institutional autonomy’.⁵ He argues that this is the result of the structure of the popular music industry. In contrast to the film industry which is highly centralised and has a clearly definable product, the music industry historically involves large number of capitals covering different areas of specialism (production, distribution, publishing...) with no unified commodity form (live performance, broadcasting rights, CDs...). Toynbee sees this as due to the ubiquity of the song as a cultural form and the relative size of the pop song *vis a vis* film. Because of this, centralised decision making in all aspects of pop production is impossible and there is thus a need for institutional autonomy. This is related to what Hirsch refers to as the ‘proliferation of contact men’. By contact men Hirsch means the workers in the music industry who work at its input and output boundaries (such as talent spotters and public relations officers). These contact men have been given greater amounts of institutional autonomy in an attempt to utilise their expertise at their specific boundary. However, whereas Hirsch was referring solely to employees within the record company, Toynbee focuses on the institutional autonomy of artists. It is the autonomy of the artist that I consider most important. This is for two reasons: firstly, the centre of the industry’s risk sharing strategy is the artist; and secondly because the change in status of some of the contact men described by Hirsch, particularly those involved in the process of recording and in A&R [Artist and Repertoire], reflects the changing status of the artist. As an example of this second point, Kealy (1979) has detailed how sound mixers came to consider their role as artistic rather than as a craft occupation. As recording technology improved after the war, the mixers became a more important section of the record label’s employees. This led to a professionalisation of sound mixers in the late 40s. During this time the mixer’s role was viewed as a technical one – his job was to record the sound in the best possible manner. However, the development of recording on tape in 1949, coupled with the generation of music stars who began to have more say in how they recorded resulted in a partnership between musician and technician in the fifties, which increased in the sixties as stars wanted even greater control over the recording process. The mixer had to cede some of his technical knowledge but began to take aesthetic decisions in the recording

⁵ 2000, C1.

process, particularly with the advent of multitrack recording. The mixer became seen as an artistic rather than technical role and some of the most successful mixers began to take royalty payments on the records they had recorded. In this manner, the increase in the artists' awareness of their own artistry (and thus their autonomy) resulted in record label employees adopting a more artistic tag themselves.

The way that a Romantic conception of the artist assists the record labels in their risk reduction is through the royalty system. The individualisation of recording makes the artist responsible for the finished record. The corollary of the artist viewing the work as his or her artistic child is that the artist has to pay for the child's upbringing (as well as conception and, most especially, birth). Authorship has always been associated with responsibility: the earliest annunciations of authorship as an embodied concept were associated with libel and sedition. This has developed (in the music industry and elsewhere) into a financial responsibility. This is systematised through the royalty system. Due to the structure of the standard recording contract, the artist or band pay for the cost of the recording as a loan against their initial royalty payments. Through royalties, the artist receives financial reward if their recording is successful. However, as already mentioned, the vast majority of records are not successful. While for the record company there is a safety net of the successful records paying for the unsuccessful ones, for the artist there is no such safety net. A fledgling group whose debut record has flopped cannot go tapping the Spice Girls on the shoulder asking if they can cover their costs for them. This leads to the situation where the economic risk of producing a new recording is shifted from the company to the artist. A UK National Heritage Committee report 1993 stated: 'the way contracts are structured, the record company can make a profit off the album while the artist's royalty account is still in the red. In fact, this is a frequent occurrence.'⁶ The royalty system, greatly assisted by a Romantic ideology, is thus able to decrease the record company's financial risk of producing a record.⁷

So if one of the methods the record industry uses to counter unpredictability is overproduction,⁸ the Romantic ideology in rock music offers a way in which the record labels can pass off some of the costs of that overproduction onto the artists themselves. A further way in which the record industry attempts to make the music market more predictable is through standardisation. This thesis is most famously stated by Adorno and has already been discussed. Standardisation – making one record sound very similar

⁶ Quoted in Heylin, 1994, p.382.

⁷ Furthermore, the contract is also structured so that the artist does not actually own the song once it has been recorded, though as this is not a specific function of royalty payments, nor Romanticism, it shall not be elaborated here.

to another to encourage people to buy the familiar – is one of the key mechanisms the record industry uses to decrease its unpredictability. Unsurprisingly, however, the industry does not highlight standardisation as a big feature of its products. Because music is such an important marker for an individual's identity (see below and chapter 10) the industry must disguise standardisation. The key way it achieves this is by utilising elements of the Romantic ideology pertaining to the individuality and originality of the stars themselves. Even blatantly standardised groups such as Westlife and Steps are differentiated through their uniquely individual personalities, manifested in the carefully constructed biographies of the stars. Standardisation is masked through an emphasis on the unique creativity of the artists, both externally (through promotion and the star system) and internally (through the massaging of artists' own conceptions of their own artiness: this is one of the chief roles of the A&R worker). The ideology of Romanticism thus fulfils a crucial function within the music industry of diverting attention from the process of standardisation.⁹

The most manifest example of Romantic individualisation in the music industry is the star system. The star system functions as a way of limiting unpredictability for the record labels. The star acts as another means of masking the standardised product but, crucially, it also acts as a market indicator. If the record label can successfully market a star, then they will be able to guarantee sales for that star's next release. Pokorney and Sedgwick have shown how Warner Brothers in the thirties consistently applied a rational approach to their investment in stars for films and,¹⁰ although the position of the star in the film industry differs from that in the music industry, record companies act similarly in their marketing of stars. In this sense, the star system is an attempt to rationalise the consumption patterns of consumers. It does this by focusing upon the individuality of each star which in turn reflects upon the individuality of each consumer.

Romanticism is here critical for it facilitates this focus on the unique individualism of the star. Because of sound recording, the star becomes associated as the 'author' of the recording: 'authorship has become inextricably bound up with stardom.'¹¹ Although the star system did exist as a way of stabilising predictability before the prevalence of Romanticism in rock (the star's virtue was characterised by 'sincerity' rather than 'authenticity'), the notion of the star has now taken on all the trappings of

⁸ Hirsch, 1972; Kretschmer *et al*, 1999.

⁹ Stratton, 1983, p.150.

¹⁰ Pokorney and Sedgwick, 2000.

¹¹ Toynbee, 2000, p.31.

Romanticism; ‘the death of the author in high art means the cult of the author in mass culture.’¹²

It is important to recognise that the Romantic ideology in rock music radiates in both directions of the exchange relationship; from and to both star and fan. It is flattering for the fan to like an intelligent individual star and it is flattering for the star to be considered a great artist. This two way relationship is to be expected because Romanticism is not merely a top down ideological imposition. Romantic ideas also arise from the bottom up and develop in ways both complementary and antagonistic to the record industry’s goals.

Romantic ideals are utilised in the star system as a way of trying to stabilise market predictability. According to Buxton, however, rock stars are more than mere signposts of guaranteed returns. They are ‘agents of consumer discipline... they anchor a chaotic aesthetico-ideological discourse and represent it in a “humanized” form.’¹³ He argues that the star system of popular music was crucial not just in its own terms, but also for the development of consumer culture in general, as the rock star became a key component in the elaboration of lifestyle patterns.¹⁴ This is a micro example of Campbell’s wider thesis that the development of the ‘Romantic ethic’ provided the philosophical basis for pleasure and recreation that was critical for the development of consumer society.¹⁵

Buxton’s and Campbell’s theses are, however, adopting a wider view than is needed here. I have so far argued that Romanticism serves as a crucial element of capitalist rationalising strategies in the music industry. I now want to turn to what I see as the two crucial functions of Romanticism in the popular music industry. The first of these is that it hides the process of commodification within popular music. The second, related, function is that it enables the one indirect relationship in popular music, that between rock star and fan, to be the most prominent. Both of these functions feed into the rationalising strategies I have discussed above, and both permeate the relationship between Romanticism and copyright that I shall discuss below.

It is necessary for the music industry to hide the process of commodification because cultural products play an important role in the defining of the self in modern society. By producing cultural goods rather than something mundane like cutlery, the

¹² Frith and Horne, 1987, p.169. This is one possible explanation for the developing rights of personality. See Gaines, 1991.

¹³ Buxton, 1983, p.434.

¹⁴ Frith and Horne state that ‘the way to be a fan is to look like the star’, 1984, p.16.

¹⁵ Campbell, 1987. The conception of ‘Romanticism’ that Campbell uses in this work is what I have earlier described as the bourgeois, hegemonic idea of Romanticism.

music industry is at the sharp end of the need to differentiate its product from competitors. I will discuss this further in chapter 10 in the context of Radin's idea of personal property, but popular music is an important cultural element of our sense of self. However, the fact that it is such an important marker means that the popular music industry must maintain and promote Romantic conceptions of individuality more than any other culture industry. If records are not supported by the idea of uniquely creative individuals making them, then it may become apparent to consumers that they are being fed a series of standardised products. Not only would this deter people from buying the 'same' product twice, it would diminish the importance of popular music for identity formation. If the consumer thinks of himself as a unique individual, he is not going to view a standardised song as important to his personal identity. So the consumer must be persuaded that each record is unique.

One of the ways that the process of commodification is submerged by the Romantic ideology is by accentuating the indirect relationship in popular music at the expense of the two direct ones. Acknowledging that there are a series of sub-levels and individuals within the whole structure of the music industry, there are essentially two economic relationships in the popular music industry: artist/company and company/consumer. Of these, the most influential one is company/consumer. The artist/company relationship is dictated by the company/consumer one; how much the label will pay the artist is governed by how many records they think she will sell.¹⁶ However, the ideological structure of the music industry is built around the indirect relationship of artist/consumer. I assert my individuality by buying a Nirvana album, not by buying an album released on the Geffen label.¹⁷ By focussing upon this relationship, the issue of commodification is once again side-stepped: the individual purchases a piece of music uniquely created by his favourite artist; she does not buy a mass produced product made by the label. The record label can thus get on with maximising profit virtually unnoticed.

The dominance of the Romantic ideology creates its own problems for record labels, however, in that it creates the ideology whereby the artist is situated *against* the record label. There is a tension in the artist/company relationship between the feeling and creativity (artistic creation) espoused by the artist and the rationalisation

¹⁶ Stratton, 1983, pp.148-149.

¹⁷ In periods of high instability in the music industry (i.e. those periods where there have been a high proportion of independent labels in the industry, such as the early years of rock'n roll, or the English punk explosion) there have been one or two labels (such as Chess Records or Stiff) who have managed to achieve the sort of status whereby the label actually becomes the important cultural identifier.

(commodification) of the company. The record labels try to ease this tension in two ways: firstly through the role of the A&R worker who tries to bridge the two worlds of rationality and irrationality; and secondly by publicly stating that the label's role is to help provide the creative environment in which rock stars can create new work. This rhetorical unification of publisher's and artist's interests, reminiscent of the early literary property debates, is extremely important for anti-piracy campaigns and will be discussed later in the chapter.

Romanticism and copyright

Within the economic structure of the music industry, therefore, emphasising the Romantic stereotype of the artist facilitates a masking of the process of standardisation that exists due to capitalist tendencies pushing toward a predictable and rational market. The rhetorical image of the artist is one way of hiding the process of commodification and succeeds by making prominent the one indirect relationship – artist/fan – in the triumvirate of interests involved in copyright. The main reason suggested why this disguising of commodification must occur is that popular music is extremely important to personal identity formation and, as we view ourselves as Romantic, unique individuals, we must view our identity markers as unique as we see ourselves.

The chronology of Romanticism within popular music offers some evidence of both of these trends. Prior to the onset of rock'n roll, popular music was not so critical to personal identity. Popular music was fairly standardised and there was a high degree of stability within the industry, characterised by the dominance of four major labels.¹⁸ As the first wave of rock'n roll developed, popular music became an important cultural marker (separating teenagers from parents) and the popular music industry became much more unpredictable due to the proliferation of small, independent record labels.¹⁹ Within a few years of these developments, rock'n roll had grown up into rock and had begun to take on the ideology of nineteenth century Romanticism. This is not to suggest a clear causal or manipulative relationship. If anything, the relationship was bottom up rather than top down: major labels were slow to react to the new ideology of rock'n roll and rock music, and the maturation of institutional autonomy was the outcome of the independent labels offering artists greater recording freedom rather than as a top down imposition by the scheming capitalists of the major labels.

¹⁸ Peterson and Berger, 1975.

¹⁹ Ibid.; Gillett, 1983.

Let us now widen the thesis a little and examine the relationship between Romanticism and copyright more generally. We can start with the same point; Romanticism hides the process of commodification that occurs when art is taken to the market. The process of commodification was one of the central features of the new social formation from which Romanticism grew. While the Romantic statements of Schiller and others gave us a way of understanding the artist within a capitalist mode of production, it also provides a way of understanding where the work of art should be situated in relation to the market: it is above the market, above commodities. It is singular and unique whereas commodities are mass produced and standardised. The Romantic ideology gave artists a way of privileging their work raising their work above ordinary commodities.

The seeds of such a belief were already in existence. Art objects had traditionally been characterised by their role in tradition.²⁰ Particularly, this was religious tradition and thus art objects were sacred and deemed above the commercial realm. Benjamin argues that the development of mechanical reproduction resulted in a shift from the embeddness of the work (its aura) to the exhibition value of the work. While this is true, art works also maintained some of their mystique. As mentioned earlier, Woodmansee, states that Romanticism turns art into a 'displaced theology'. As an element of their professional protest (ensuring their work maintained a special position above the realm of commodity), Romantic artists sustained the notion that artistic works are sacred.²¹ And this meant that, ideologically at least, the artistic work maintained a position above, rather than in, the market.

This created a problem for artists because all works were produced for the market, just as now all popular music is commodity. However, the artist must emphasise the traditional features of the work while disguising the market aspect of the work, else he may be challenged as not being an artist. There is no time in this thesis to answer why this should be so but it is undoubtedly the case that the Romantic ideology of artistic creation that developed in the late eighteenth century is at least in part an attempt to emphasise the traditional sacred elements of the art work rather than the new, commercial elements.

However, had this ideology been contrary to the social relations of production of the time, it is unlikely that the Romantic beliefs would have become as hegemonic as

²⁰ Benjamin, 1992, p.217.

²¹ There is a certain circularity here; why can art works not be commodities? Because they are sacred. Why are they sacred? Because they are above the realm of commodities.

they have. What occurs, however, is that the Romantic ideology reinforces the commodification of artistic works. Frow has noted

...the paradox that the concept of the unique and self-determining person – precisely what seems most to resist the commodity form – lies at the basis of the values of “singularity” and “originality” that have come to be central to the market in industrially produced aesthetic goods, and underlies the commodification of knowledge in many areas of intellectual property law.²²

Highlighting the singularity of a work results in that work becoming more valuable. In this way, the ideology of Romanticism is an ally to the processes it seemingly opposes. Not only does Romanticism ‘distract the consumer from the commodification which has taken place’,²³ it provides the basis of the value of such commodities. I shall return to this in chapter 10.

There is another way in which Romanticism assists the capitalist process of the cultural industries, although this does not have its basis in the historical origins of Romanticism and is not as significant as the function just mentioned. Romanticism also serves as a way of disguising the alienation that occurs between publisher and author. The most apparent alienation within the artist/company relationship is that of the commodification of the art object. The artist does not want to see their creation as product, and the further it progresses through the industry, the more the work appears in a fetishised form. This process of fetishisation implies a distancing of the work from the artist, and is thus contra to one of the key characteristics of authenticity. However, this most apparent alienation is misleading, for the more significant alienation is the transference of intellectual property rights from artist to publisher. In the music industry, as in every other area of copyright, the development of the Romantic author has been crucial in generating a locus where copyright can first be located which can then be ceded to capital. For copyright rights to be effective, they need to be unified. If an alternative process of creativity were to be used then rights may be diffused which would cause problems for the exploitation of works.²⁴

²² 1995, p.144.

²³ Stratton, 1983, p.148.

²⁴ A good example of the problems of un-unified rights is of the early BBC sessions performed by the Rolling Stones. Keith Richards has stated that they should be released and the BBC, who would like to release them to gain a windfall, publicly stated that they would release them. Copyright in pre 1970 Rolling Stones recordings, however, is owned by ABKCO and they refuse to sanction a release. See

Once copyright is unified in an identifiable individual, these individuals have historically been in weak bargaining positions. The author who goes to the publisher may have no alternative way to make money; the new band has no other way of breaking into the music industry. The publisher or record company, however, have other authors and bands to ensure their profitability. There is a power inequality in this relationship which enables publishers to acquire unified rights. This is one explanation why publishers have historically campaigned for copyright protection on behalf of authors. One of the reasons that Romanticism has become so central for copyright is that it centralises reproduction rights in an individual who is in a weak bargaining position with publishers and thus generally results in the ceding of unified rights to a company.

This, however, does not explain why it is important that rights should be granted to the artist originally and not straight to the publisher. Even when copyright was seen as a reward for publication, rights were still initially vested in the author who would almost inevitably cede them to the publisher. This does not seem to make a great deal of sense; if a manuscript or a recording only becomes valuable in the hands of a publisher, why not just vest the valuable economic rights in the publisher from the beginning? Why do copyright industries have to rely on the artist alienating their rights by contract?

Romanticism and the strengthening of copyright

The answer to this puzzle is that copyright protection is strengthened through its reliance upon the Romantic author. A copyright that was initially invested in the publisher may be seen solely as an economic monopoly and thus a burden on society. However, the strength of copyright protection can, in the main, be put down to the vitality of the Romantic author. There are three chief ways that this occurs: the Romantic author facilitates an increase in the breadth and duration of 'suitable' protection; copyright understood as being founded on the natural rights of authors offers an inherent bias toward copyright owners; the Romantic author provides the chief rhetorical weapon for publishers and enables debates about piracy to be moral rather than merely economic. I shall discuss each of these three functions in turn.

The scope of copyright has increased dramatically since 1709. It has increased both in terms of the breadth of protection and the duration of protection. This is due in significant part to the centralisation and elevation of the author. As explained in chapter

David Sinclair (1998) 'It's only rock'n roll but who owns it', The Times (London) 14 January, features section.

2, copyright is inextricably linked with notions of individuality and immortality. Without taking external factors into consideration, these associations imply a perpetual copyright. Wordsworth sought a perpetual copyright as the only proper monument to the individuality of the poet. However, perpetual copyright has always been curtailed because of the consideration of the public interest. This consideration was initially paramount in copyright law, but has since diminished in importance. Once this consideration diminishes, there is a tendency in copyright to increase the length of protection to 'fulfil' the duty to the Romantic author and reach toward a perpetual copyright. The removal of renewal provision from US and UK copyright laws indicates this trend. In both countries, copyright legislation initially provided for one period of protection which would be followed by a second period of protection available to the artist rather than the publisher, but only if he remembered to renew the copyright. This benefited both the author (it meant that he did not cede all of his copyright term to the publisher) and the public (who gained from those works not renewed entering the public domain early). However, critics argued that this was inimical to the spirit of the author (why should a genius have to renew his rights?) and in the UK in 1814, and in the US in 1909, these renewal options were removed in favour of one longer period of protection. The chief beneficiaries of such a move were the publishers, who could now get the author to cede her rights for the entire duration of the copyright, but this change would probably not have occurred if not for the figure of the Romantic artist. Copyright's long standing propensity for extension is the result of the centralisation and elevation of the Romantic author, for each extension moves copyright closer to the ideal of an eternal monument that was conceptualised by Wordsworth.

It is not just the length of copyright protection that has extended, however, it is also the breadth. Copyright was originally a trade regulation and as such it was concerned solely with *piracy* (the unauthorised copying of a published work). As the Romantic author became centralised in copyright, however, it shifts the focus of copyright infringement away from piracy (though that is still important for publishers, rhetorically it is not as important as the Romantic author as we shall see below) and onto *plagiarism*. The emphasis of infringement has shifted from compensation to control. And this control is on *all* aspects of the work, not just the commodified aspects. This is significant because it opens up new possibilities of what rights must be protected to honour the Romantic author. Modern areas of copyright expansion such as the film rights of a book or translation rights are examples of the logic that the Romantic author

should control everything related to their work.²⁵ This includes the ability to prevent others from using ‘their’ work to create other works and, with the growth of new methods of dissemination using the internet, is currently developing into the ability to control the public’s access to information, not just controlling the work itself.²⁶

A copyright that is understood to be based upon the Romantic author, therefore, has the propensity to extend and expand in keeping with the logic of a Romantic copyright protection. Furthermore, not only does this type of copyright involve a logic of continual expansion and extension, it also contains an inherent bias towards authors when explicit conflicts occur between the public and the author’s interests. Copyright is incorrectly understood to be founded in the natural rights of authors. This misunderstanding of copyright’s origins results in an inherent bias towards the author.

By stating that there is an inherent bias, I am putting a stronger case than that by either Hughes (1998) or Boyle (1996). Both of these writers state that judges tend to favour authors when clashes of private and public interest occur, but they stay short of claiming that this is a bias inherent in copyright, instead suggesting that it is the result of judges favouring authors because a) authors cut a noble figure which are likely to be looked on favourably and b) private interests tend to win out against public interests on most issues. Both of these points are true but do not go far enough. The reason that there is an inherent bias within copyright based on the Romantic author is the potency of the natural right argument.

As I have stated earlier in the thesis, copyright exists as a clash of three interests; those of author, public and capital. Of these, however, it is only the authors’ interests that has been claimed as a natural right. As Patterson states (regarding the US constitution) ‘of the three policies in the Copyright Clause – the promotion of learning, protection of the public domain, and benefit to authors – two are intended to benefit the public, one the author. Only the benefit to the author, however, has been claimed to be a natural-law right.’²⁷ The public is granted no natural right to read or learn in copyright legislation; there is no securing of a ‘right to read’.²⁸ The problem with this is that in a clash between a supposed natural right and a general right of the public not characterised as a natural right, it is the author that wins out (or, more accurately, the author’s assignees).

²⁵ Though this logic is driven, as Edelman explains, by the drive for profit.

²⁶ Litman, 1994b.

²⁷ 1993, p.24.

²⁸ Litman, 1994b, p.38.

An example of this is the development of the fair use provisions. Fair use (called fair dealing in the UK) is an element of US copyright that was introduced in 1976 which defined certain uses of a copyrighted work that were not deemed infringement (such as quoted in reviews or limited copying for research). Although this may look like a benefit to the public, it is actually an example of the two trends I have so far discussed here. The introduction of fair use changes the burden of proof from the copyright holder to the user. Before fair use, the rights holder had to prove that a use was an infringement of their copyright. After fair use, *all* uses of a work are infringement unless explicitly exempted by the fair use provision. The burden of proof is now on the user to show that their use of the work falls within an explicit exemption. It is no surprise that Fair Use was introduced in the 1976 Copyright Act which ‘Romanticised’ American copyright. This is both an example of the expansion of copyright to cover all related aspects of the work (increasing the breadth of protection) and is the result of a misguided notion of natural rights. A US government report on copyright in the digital age states ‘users are not granted any affirmative ‘rights’ under the Copyright Act [of 1976]; rather, copyright owners’ rights are limited by certain exemptions from user liability.’²⁹ This tendency of expanding and extending copyright protection at the expense of the public interest is inherent in current understandings of copyright because of the belief that copyright is an author’s natural right and there being no similar claim to natural right status of the public’s interest.

It also leads to what Patterson refers to as the ‘cross-pollination’ effect: courts will tend to give greater protection to new technological uses of copyrighted works because of the inherent leaning toward the Romantic author and because they are not bound by any precedent that is likely to be protective of the public interest. This means that rights given to new forms of work are stronger than those given to traditional works. Once this occurs, however, it is relatively easy for rights holders of traditional works to gain a similar level of protection.³⁰ Because of the rationale of the fair use exemption, any new uses that evolve (on the internet or anywhere else) are explicitly the control of the rights holder unless the state chooses to legislate it as fair use. This pattern is repeated in civil law countries, where new uses of a work are automatically assumed to be the prerogative of the author. As new technology develops, rights holders’ rights get stronger and stronger. This has proved particularly damaging with regard to the internet, as rights holders are now moving to commodify access to the work, leading Litman to

²⁹ Draft report for Information Infrastructure Taskforce, 1993, quoted in *ibid.*, p.39.

³⁰ Patterson, 1993, fn.10.

argue that rights holders now hold the right to control how users read or listen to the work.³¹

This inherent leaning towards the author is also served by the unification of the rights that was described above. The fact that the Romantic author enables an individual or corporation to claim the rights in a work leads to a more concentrated interest group than those supporting the public interest. The public's general interest in copyright, however, is extremely diffuse so 'a grass-roots revolt of copyright users seems unlikely.'³² This problem is exacerbated because the individual interests involved tend to be those that are politically powerful.³³

Romanticism and rhetoric

Thus Romanticism functions for copyright holders because it facilitates an expansion and extension of copyright because of the mythical bond between author and work and stresses the natural right of authors while downplaying any such public right. All of these functions work to strengthen copyright protection, leading to a stronger grip on the cultural commodity and increased profits. There is one further function of the Romantic author, however, and it may prove to be the most significant. Because an increased copyright may not be beneficial to the public interest, the culture industry capitals have to persuade the public that their interests are compatible with each other. Capital needs to get the public on side for if it does not, its anti-piracy measures will meet with little success. The Romantic author is the chief rhetorical weapon which copyright holders can use to counter copyright infringement and gain stronger copyright protection. There are many different ways that publishers try and attack piracy but they all use the artist rather than the company as the centre.

Those in the copyright industries have a need to persuade the public that piracy is a bad thing. This is for two reasons. Firstly, Kretschmer argues that rhetoric of this type is used to soften public opinion towards campaigns for stronger copyright protection.³⁴ If piracy can be shown to be rampant and harmful to shared interests then it can increase its pressure to strengthen copyright protection to counter the problem. Secondly, as

³¹ Litman, 1994b.

³² Ibid., p.33.

³³ This is intensified by the process of making copyright law in the US – put all of the interest groups together and tell them to reach a compromise acceptable to them. This was how the 1976 Act was established, and why it reflects the interests of the major cultural industries rather than the librarians and academics who spoke up for the public interest. Litman, 1987.

³⁴ 1999.

individuals generally do not care about the profit margins of large multinationals, if it does not persuade the public that infringing copyright is harmful to more than just record company profits, then the small scale, non-commercial infringements of copyright that occur daily (such as copying a CD for a friend) will increase. The problems that the music industry are currently experiencing with Napster are one example of this. And because consumers do not care about the interests of big companies (itself the outcome of the Romantic ideology), the artist is the key rhetorical weapon with which the industry can deter piracy.

The popular music industry has what Kretschmer calls a 'peculiar way of lobbying'.³⁵ It informs the world how much money it loses through piracy. However, although a large macro-figure is given, this argument is refined so that the economic impact upon artists is the key consideration. The major economic argument against piracy is that it takes money away from artists. In case the individual does not feel unduly concerned about losses from Mick Jagger's or Prince's bank accounts, this message is further refined to highlight the losses small bands and struggling artists – those that better fit the Romantic stereotype – suffer:

Recording artists, producers, composers, publishers of compositions, musicians and vocalists helped make the record, as well as musician's unions, are all cheated by pirates out of their share of royalties. These people in the music community generally depend on royalties for their livelihoods³⁶

The other main economic argument used against piracy is that, by reducing the profits of the record labels, it damages the 'creative environment' that these labels provide for musicians. The record industry is portrayed as merely an altruistic conduit. The following is from the RIAA's anti-piracy press kit (note the prioritisation of the 'investments'):

Record companies invest a great deal of artistic and technical skill, money and effort to create the master recording from which legitimate commercial copies are made. These companies also expend huge sums to search for,

³⁵ 2000, p.203.

³⁶ RIAA anti-piracy presskit, taken from www.riaa.com/antipir/releases/presskit.htm (visited 28/12/99).

develop and popularize performers... [and] subsidize less profitable types of music (classical, jazz), new performers and composers.³⁷

Despite there being many economic arguments put forward by record labels in their efforts against piracy, there are not any that come out and state 'counterfeiting will decrease the size of the Polygram CEO's annual bonus'. All economic arguments are in terms of rewarding the artist or providing a creative environment. They are not phrased in terms of profit margins and corporate commerce because economic arguments based on corporate interests would not win over public support. When Len Creighton, Director of the RIAA's anti-piracy unit, compared music to Q-Tips and Triscuits, it elicited the following response from Playboy rock critic Dave Marsh:

To the RIAA this stuff is just property where to the rest of us it's culture. Anybody who would reduce Bob Dylan live in Manchester 1966 or Bruce Springsteen at the Bottom Line in 1975 or various blues and gospel records which for years could not be had in any other way [except through bootlegs] to the same level as Q-Tips or Triscuits is a person who ought to be fired summarily if the industry in question has any self-respect.³⁸

This is why the industry needs to centre their anti-piracy arguments on the artists.

However, it is unlikely that arguments against piracy that only concentrated on the economic side of artistry would succeed for the record industry. The chief benefit of the Romantic author for copyright rhetoric is that it changes piracy from an economic issue to an aesthetic one. This rhetorical battle is facilitated by the submergence of the process of commodification. If the submergence of commodification is entirely successful, then economic arguments are unimportant as the work is not viewed as an commodity. Because of Romantic notions of individuality and personality, however, copyright infringement is shown to be even more than just an aesthetic issue, it is a *moral* one. Frith has regularly linked the aesthetic and moral elements of popular music, stating that 'aesthetic and ethical judgements are tied together: not to like a record is not just a matter of taste; it is also a matter of morality.'³⁹ This is no surprise if what Taylor says is true – that authenticity is the central moral ideal of modern society, and

³⁷ Ibid.

³⁸ Quoted in Hoffman, 1997.

³⁹ Frith, 1998, p.72.

authenticity intensifies the importance of aesthetic originality.⁴⁰ Frith gives the example of how the British Phonographic Industry's (BPI's) campaign against home taping in the mid 80s, ('home taping is killing music') had the strong moral overtones of equating home taping with murder.⁴¹ If one looks at the RIAA quote above, the emphasis is on pirates 'cheating' artists out of their money. The success of the separation of industry/rationality/ commodification from art/feeling/personality in the music industry means that any form of piracy can be seen as *personal offence* to the artists involved. The primary message that is given by the industry in regard to piracy is always artistic and often moral. The paradigm of this model is the bootleg record, and I shall discuss this in more detail in chapters 9 and 10: the release of a bootleg takes artistic control away from the artist (it does not take control of the commodity away from the company):

It is out-and-out thievery. What is it that the artist has to bring to the public? What he can create. He has a right to decide what (material) it is he wants to represent him, and he has a right to be the editor of that material. If someone steals his music and offers it for sale to the public, that artist is being deprived of his right to determine how he wants his music released.⁴²

Piracy shifts from being an economic crime to be a crime against the person. Kretschmer notes that the 'rhetoric of plagiarism, theft and piracy has taken on a particular moral certainty.'⁴³ The etymology of plagiarism is illustrative of the type of Romantic ideology from which it stems; the word comes from the Roman crime of *plagium*, meaning the 'the crime of stealing a human being'.⁴⁴ The phrase 'piracy' for copying intellectual property carries a similar message: the original form of piracy was considered a crime against humanity comparable to genocide.⁴⁵ This approach by record companies – persuading the public that piracy is bad because it damages artists rather than their profits– has a much greater chance of success because individuals care little for the profits of large companies.

In this chapter, I have examined how the Romantic author 'works' for both the record industry and the copyright industries more generally. I have argued that the

⁴⁰ Taylor, 1993.

⁴¹ Frith, 1987. As one example of such moral hyperbole, Jack Valenti, President of the Motion Picture Association likened TRIPs to the cold war and the pirating of Snow White videos to thermonuclear weapons. Cited in Boyle, 1996, pp.251-252, fn.9.

⁴² Bob Altschuler, corporate representative for CBS Records, in Vettel 1986.

⁴³ 2000, p.6.

⁴⁴ Swack, 1998, p.366.

primary functions of Romanticism in the music industry are that it hides the process of commodification and makes prominent the indirect relationship between artist and fan. These features are extremely important for the functions of Romanticism in copyright. I argued that the Romantic author in copyright not only hides the process of commodification, it also disguises the primary alienation that occurs in copyright as well as creating an inherent bias in copyright toward the author that results in a continual expansion and extension of copyright protection. Finally, I argued that the figure of the Romantic artist is the chief rhetorical weapon used by cultural industries in their attempts to persuade the public that piracy is harmful. By relying on the Romantic author, record labels and publishers are able to turn piracy from an economic issue to a moral one.

I have not yet looked at how the autonomy of the ideas of Romanticism may create problems for the record industry as well as fulfil functions. This shall occur in the case study of bootleg records. This area of popular music culture, which has so far been neglected by academic study, offers a paradigm example both of how the record industry uses Romantic imagery in an attempt to maintain economic control of the product, but also how the same imagery creates a situation where the industry is seen as inimical to Romantic ideals and must therefore be circumvented. This reinforces the statement I have regularly made in this thesis –that Romanticism is not merely a puppet of capitalism.

⁴⁵ Boyle, 1996, p.121.

Chapter 7

Introduction to the case study of bootlegging

In the second part of this thesis, I present a case study of bootlegging. This case study is not intended to be an exhaustive analysis of the phenomenon but will provide a general overview of bootlegging while at the same time focusing upon the issues in bootlegging that prove most salient for the arguments in the whole thesis.

There are a number of reasons that I am offering this study. The first of these is to begin to address, in a sociological manner, an important element of popular music culture. Despite its relatively small size, an analysis of bootlegging offers ways of understanding many aspects of popular music. For example, it offers insights into the nature of fandom, as well as highlighting questions regarding fetishisation in popular music. Bootlegging also offers us an interesting area to examine within traditional subcultural theory and we can question whether, by utilising alternative methods of production and distribution in the popular music industry, bootleggers and bootleg collectors play the role of class resisters. According to Neumann and Simpson, bootlegging

...define[s] and address[es] broader issues regarding the relationship between “deviance” and cultural production, the meanings popular music holds for social collectivities and individual collectors, the tension between “authenticity” and commercial artifice, and the various ways music becomes anchored in their lives. The larger implications of these bootleggers’ accounts is that they help reframe the meaning of popular culture as an ongoing source of cultural production – one that is constantly renewed and revitalized through individual efforts to seek out personal and social relationships through activities considered marginal by a commercial music industry...¹

The subculture of bootlegging thus offers a microcosm of many of the issues in popular music with which sociological analysis has attempted to come to terms. It is thus surprising that it has been almost totally ignored by both sociologists and cultural studies scholars. The small amount of academic work that there is on bootlegging comes almost

¹ Neumann and Simpson, 1997, pp.321-322.

entirely from legal scholars and too often this type of study ignores the meanings attached to bootlegging by the people involved. It is intended that this work shall be the first step in developing a more substantive study of the phenomenon. However, this current study is only a means to an end: introducing bootlegging at this point serves to illustrate a number of themes of this thesis and helps bring certain ideas together. It does not offer an exhaustive study of the area.

Firstly, the case study enables me to bring the history of copyright up to the end of the twentieth century. Much of the copyright legislation in the 1990s was specifically designed to prevent bootlegging and occurred within a much more fundamental shift that brought intellectual property protection under the auspices of the General Agreement on Tariffs and Trade (GATT). Focusing on bootlegging will thus enable me to examine whether recent legislation is compatible with the arguments I have posited regarding earlier copyright history.

Secondly, bootlegging offers one avenue worth exploring with regard to the idea of a positive public right in copyright. Indeed, by taking some control of the artistic product away from the artist and the record company, it is an area where the public has seemingly asserted its own right already. This means that although bootlegging is an explicit challenge to the idea of ownership in copyright, it is also a challenge to the paradigm of Romantic authorship that I have been criticising. The bootlegger, the taper and the bootleg collector remove a portion of authorial control from the work. Bootlegging thus provides a challenge to both the legal and the cultural elements of this thesis. Part of this case study will therefore examine whether any of the suggestions made in chapter 4 regarding a positive public right in copyright may be practicable for bootlegging.

In order to link with the first half of the thesis, the case study, as well as providing an overview of bootlegging, is structured around answering the following question: *why does the record industry view bootlegs as such a major problem when they are of minimal economic significance?* Although there are various moral panics in the history of popular music copyright, such as the furore over home taping, the ferocious campaign by US companies against DAT and the current concerns over MP3 and Napster, bootlegging has been a consistent folk devil. This seems a curious prioritisation by the record companies given its small size and suggests that there must be something more than mere economics involved. It is therefore worth examining what potential symbolic values bootlegging incorporates that may be conceived as such a threat to the industry.

The structure of this study is as follows: firstly, I shall give a brief overview of the copyright interests involved in a sound recording and differentiate bootlegging from other types of piracy. In chapter 8, I shall detail the qualitative and quantitative aspects of bootlegging before discussing how the legitimate industry has responded in chapter 9. In chapter 10 I shall attempt to describe the symbolic importance of bootlegging and relate it to the first half of the thesis. Finally, in an afterword, I shall detail contemporary legal and technological currents which pose a threat to the future of bootlegging.

On music copyright

Before moving onto the case study proper, I shall briefly give details of some of the more important aspects of copyright in music. This shall only cover the points relevant to this thesis, however, as the mechanics of music copyright are extremely complex and, as this is not a law thesis, I shall only give the broadest of overviews here. Following this, I shall define the different types of piracy in the record industry and explain the differences between bootlegging and other forms of piracy. This is extremely important for the case study and avoids the pitfalls of many legal works on piracy which fail to distinguish bootlegs from either counterfeits or pirates.²

When a song is recorded, the sound recording is considered a *derivative work*. This means that it derives from an original musical work. The rights in the sound recording and the rights in the song (the original musical work) are thus distinct legal entities. A sound recording of an original music work has four different copyright interests. The first two of these is the author's copyright: the author has a copyright in the song and a copyright in the lyrics as a literary work.³ This copyright is limited in most countries by a form of compulsory license. This means that a performer can perform any song that has already been published so long as they pay a compulsory mechanical royalty rate to the owner of the song's copyright. In this instance, the copyright holder cannot refuse permission to use the song although they are entitled to compensation. As with copyright of other original works, the songwriter's copyright lasts for the life of the artist plus a seventy year *post mortem* term.⁴ Except in the US and a few smaller countries, the author also has moral rights, which are perpetual. Record labels' control over musical copyrights in the US has recently been strengthened by a

² For example Brown, 1995; Blunt, 1999.

³ This could be held by two (or more) people; for example, if one person wrote the melody and another wrote the lyrics.

change in legislation which enables labels to view musical recordings as works for hire unless explicitly stated otherwise in the recording contract.⁵ The third copyright interest is that the record producer owns a right in the sound recording. The producer is not the individual normally considered as the producer in the record industry— the producer of a recording session. Rather, the producer in copyright terms is the individual or company that is responsible for the production of the recording (i.e. those who provided the studio, paid for the studio time etc.). This is usually the record company. In Europe, the producer's rights in the sound recording are understood as neighbouring rights, but the US has no concept of neighbouring rights and these rights are just considered as copyright.⁶ Finally, the performer owns rights in the performance that has been recorded. This is known as *rights in performances*⁷ and they currently last for fifty years in the UK.⁸ Except in the US, the performer also has some moral rights over his performance. Rights in performance are a relatively late development in copyright history. Although the UK has provided some form of performers' rights since 1925,⁹ they were significantly strengthened by the 1988 Act. The US had no performers' rights at all until 1994. This new emphasis on performers' rights is specifically a reaction against bootlegging.

The rise in prominence of performer's rights highlights a potential problem for this thesis. How much are we talking about *authors* in this case study and how much about *performers*? The interests of these two groups could be seen as quite distinct (one of the reasons for the historical lack of performers' rights in the US was the political strength of the songwriting lobby) and copyright laws certainly treat them differently. There is a hierarchy of songwriters over performers (Boulez once stated 'instrumentalists do not possess invention - otherwise they would be composers.'¹⁰) which sees composers' work protected for a considerably longer period than performers'. Although there may be certain tensions in copyright law about treating performers as fully-fledged

⁴ This is the standard term in the EU and USA, though other countries may have lesser protection. A work of joint authorship is protected for seventy years after the death of the last surviving author.

⁵ Mark Lewis, (2000), 'Amendment to copyright act means that artists will never own their recordings', *Live Daily* 8/2/00, available at <http://www.livedaily.com/archive/2000/2k01/wk3/AmendmentToCopyrightActCo.html> (last visited 8/2/00).

⁶ Although works 'created' by corporations in US are only protected for 95 years.

⁷ Rights in performances must be differentiated from *performance rights*. Performance rights are of much longer standing in copyright and relate to the rights of the record producer to gain a fee whenever their sound recording is played in public, for example on the radio or in a restaurant.

⁸ As will be explained in the afterword, they are apparently perpetual in US law.

⁹ Sherrard, 1992, p.57. The Dramatic and Musical Performers' Protection Acts of 1925 and 1958 only offered criminal redress.

¹⁰ Quoted in Frith, 1998, p.138.

authors, the invention of sound recordings have enabled the performer to become understood as the author of the song in popular music. The performer can therefore still be considered to fulfil some of the same ‘author-function’ roles as the traditional author so, although I may be glossing over some of the intricacies of this relationship here, I think that the arguments made regarding the author remain valid when the author is replaced by the performer.¹¹

International copyright and bootlegging

The above section may already indicate one of the primary problems of studying this area; the differences in copyright regulations across many different countries. As bootlegging is an international phenomenon that has frequently benefited from discrepancies in local copyright laws, the researcher is left with the same problem as the enforcement agencies – how to understand all the variations.

Because sound recordings have been protected by copyright in the UK since 1911, the UK has always had strong anti-bootlegging laws. This is one reason that there has always been very little bootleg production in the UK, although it is still a large market for bootlegs. The US, historically has had weak bootlegging laws. This is because the phonogram (the technical copyright expression for record or CD) was discounted from being considered a ‘writing’ in constitutional terms. This was affirmed in the 1909 Copyright Act that did not grant protection to sound recordings because ‘records are not literary or artistic creations, but mere uses or applications of creative works in the form of physical objects.’¹² The US did not offer any protection of sound recordings until 1972, which may be somewhat surprising given that the US has always been the largest producer of phonograms. During the 1990s, however, the US has significantly strengthened its anti-bootlegging law and this shall be discussed in the case study.

The problems created by national variations of copyright laws are being lessened by a process of harmonisation. For example, the anomalies of German and Italian copyright laws that created a major headache for the record industry in the early nineties have been eliminated by the process of harmonisation, both from the EU but also in wider terms through the introduction of TRIPs. The majority of bootlegs are currently produced in Eastern Europe and Asia. These countries traditionally had lax copyright

¹¹ Saadi, 1997, provides a good example of an article that takes an extremely Romantic view of the creative powers of performers in order to promote full copyright protection for performers.

regulations but are currently being forced to strengthen their laws, particularly countries which are seeking to join the EU, such as Poland.

Major treaties affecting bootlegging

The major treaty on copyright, the Berne Convention, does not protect sound recordings. Also, Berne only protects works that are fixed in a tangible form, which means that it does not protect performances. Both of these are significant for bootlegging. Berne does, however, protect both published and unpublished works. This is notable in that it protects songs (as musical works not as sound recordings) that an artist has chosen not to release on an album. Nonetheless, despite this benefit, Berne is of little use for the record industry in combating bootlegging.

Because of the ineffectiveness of Berne, 'The International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations' (The Rome Convention) was established in 1961 as an attempt to prevent the piracy of sound recordings. Rome protects sound recordings for a minimum of twenty years. However, Rome is primarily an attempt to protect the producers of phonograms (the record companies) and while it does offer some rights to performers, it does not give performers any rights to claim damages.¹³ There are two significant weaknesses of Rome, however. Firstly, it did not prevent the importation of recordings that were manufactured legally in one country but would have been illegal if manufactured in another country. As will be discussed below, this was to prove extremely significant. Secondly, not many countries signed up to Rome. Rome currently has 63 signatories. The most significant absentee was the US, which refused to join Rome because the US did not recognise performers' rights.

Berne and Rome have to some extent been superseded by TRIPs, which incorporates all of the substantive points of the two (excluding the moral rights provisions of Berne) and significantly strengthens enforcement procedures. TRIPs has had a major impact on international intellectual property rights enforcement and I shall discuss it in the afterword.

¹² Quoted in Heylin, 1994, p.25.

¹³ Groves, 1990, p.202.

Definitions of Piracy

For reasons that will hopefully become clear, it is extremely important to distinguish bootlegging from other forms of record piracy. Record companies often lump all together under the generic category of 'piracy' but this is to blur rather than clarify. Indeed, bootleggers often have the indignity of having all pirate recordings referred to as 'bootlegs', a misconception regularly reinforced by the media.¹⁴ There are actually three different types of piracy in the record industry. The most straightforward of these is counterfeiting. This is making a straight copy of a record released by the record label, including all of the packaging. According to the BPI, counterfeiting is 'the unauthorised copying of the sound of the original recording, as well as the artwork, label, trade mark and packaging. The aim of making counterfeits is to mislead consumers and make them think they are buying the genuine article.'¹⁵ The second type of illegal recording is the pirate.¹⁶ The pirate is a new release, not one passing off as another. However, the sounds on the record will all of come from already officially released tracks. As an example, assuming the manufacturer has not got clearance from all the different rights owners, a collection of every number one from 1999 would be a pirate album. The RIAA anti-piracy website describes a pirate recording as 'the unauthorized duplication of only the sounds of one or more legitimate recording.'¹⁷

Bootlegging

The final type of piracy is bootlegging.¹⁸ Like the pirate, the bootleg is also a new artefact rather than one passing off as a legitimate release. However, unlike the pirate, the bootleg is made up of recordings that have never been officially released. The majority of such recordings are of live concerts but there are some which feature 'outtakes'. These outtakes are unreleased alternative versions of songs that were

¹⁴ For example: Danylo Hawaleshka, 'How fake goods sail past customs', Macleans (Canada), 20/3/00, pp.48-50 (calling counterfeit goods 'bootleg'); Stephen Bates and Kevin Rafferty, 'West tries to silence Japan's "bootleg" tunes', The Guardian 10/2/96 (referring to pirated releases); The otherwise good Vettel, 1986, refers to a 'bootleg' version of the Band Aid and USA for Africa singles, both of which were official releases and thus cannot be bootlegged.

¹⁵ BPI Anti-Piracy Unit, 'Protecting the value of British Music'.

¹⁶ This causes confusion as 'piracy' refers to any activity that infringes the rights of the copyright holder whereas 'pirate' and 'pirating' refer to a specific kind of infringing recording.

¹⁷ <http://www.riaa.com/antipir/releases/presskit.htm> (last visited 28/12/99)

¹⁸ The original term 'bootleg' comes from the prohibition era, when it was common practice to carry a bottle of whiskey in one's boot. The term was in common currency at the time and it was transferred to records by the media. Appropriately, one of the more popular ways of smuggling a tape recorder into the show is in one's boot.

officially released, or songs that have not been officially released by the artist or record label.¹⁹

Bootleggers seek out arcane recordings, often playing detective roles to gain tapes from industry insiders, and often spend time editing the tapes to improve the recordings they have. The act of bootlegging is not as simple as buying the latest albums from the high street and copying them. It thus contains an element of creativity that is absent from counterfeiting and pirating.²⁰ Bootlegging has been described by Schultheiss as a form of ‘performance piracy’.²¹

Bootlegging should be differentiated from tape trading. Tape trading involves individuals swapping tapes between themselves in a non-profit manner whereas bootlegging is a commercial activity. The substance of the recordings is the same – live performances and outtakes – but tape traders often view bootleggers with great contempt. Traders generally view bootlegging as profiting unjustly off an artist and they tend to complain about them even more than the major record labels. The relationship between taping and bootlegging is complex but shall not be investigated here. The aesthetic motivations of those who tape or trade tapes and those who make or buy bootlegs seem to be quite similar and I will treat them as such in this study. This goes against the traders’ arguments that all bootleggers are interested in is money, but this research shall illustrate that this statement is not so clear cut. While recognising that commodifying an underground artefact changes the nature of the activity, it does not change the nature of the authorial challenge that both taping and bootlegging pose nor, ironically, the criticisms made by bootleggers and bootleg collectors about the commodification of popular music.

¹⁹ One oddity that crops up in the bootleg world are the ‘hard to find’ releases. These albums collect together recordings by a particular artist that are often difficult for a collector to track down, such as old single B-sides, guest appearances, soundtrack performances and so on. These recordings are pirates rather than bootlegs because they copy recordings from officially available releases.

²⁰ Heylin, 1994, p.8.

²¹ Schultheiss, 1981, p.306.

Chapter 8

Case study of bootlegging

*Heard melodies are sweet but those unheard
Are sweeter¹*

Bootlegging first emerged in the early twentieth century. Lionel Mapleson, the father of bootlegging, recorded performances from the Metropolitan Opera House in New York between 1901 and 1903. The crude recording equipment given to Mapleson by Thomas Edison could only record a few minutes at a time but his recordings are now viewed as artefacts of vital historical importance.² The first real bootleg era came in the 1950s and 1960s when jazz aficionados recorded live performances by many of the jazz greats. These were freely on sale in Greenwich Village but were ignored by the industry. The first rock bootleg was issued in 1969 and marks the beginning of this case study. It was less ignored by the industry.

The early history of rock bootlegs

Given the demand for products by the most popular stars of the sixties, it is surprising that it took until 1969 for the first rock bootleg to appear. Following a motor cycle accident in July 1966, Bob Dylan had been out of the public view for 18 months. We now know that he spent much of this time in Woodstock recording songs with The (then un-named) Band that would prove to be the musical bridge between his 1966 album *Blonde on Blonde* and his 1968 offering *John Wesley Harding*. At the time however, this link was missing in Dylan's official canon and there was confusion over Dylan's change of direction. This was exacerbated when cover versions of unheard Dylan songs began to hit the charts that sounded much more like the 'old' Dylan than the 'new' Dylan did.

The source for these cover versions was a fourteen song acetate of publishers' demos made by Dylan's management of the recordings from the *Basement Tapes*.³ Hip West Coast radio stations got hold of these acetates and began to play them on the radio

¹ Keats, *Ode to a Grecian Urn*.

² Heylin, 1994, p.28.

³ So called because they were recorded in the basement of Big Pink, the house where The Band were staying.

and *Rolling Stone* ran an article in June 1968 detailing the lost Bob Dylan album. Dylan fans were being whipped up into a frenzy about these mysterious recordings. Something had to give, and rock's first bootleggers, Dub and Ken, both huge Dylan fans, manufactured a double album with a white label on the discs and housed in a plain white sleeve. They pressed 'either 1000 or 2000' and took them around to the shops in their local Los Angeles area. When one shop owner asked for the title of the record, it was suggested that it be christened the *Great White Wonder*. Dub made a stamp with 'GWW' on and the name was stamped on all the copies. The West Coast radio stations were the first to pick up on the new phenomenon, playing tracks from the new record. The press soon followed, with articles in *Rolling Stone*, *Wall Street Journal* and *LA Herald Examiner*. In November, *Rolling Stone* ran a six page article on Bob Dylan's unreleased recordings. The news was out that there were records that artists and companies did not want you to hear and the demand for such items began to escalate.

GWW is probably the most successful bootleg of all time and in its various guises has sold around 200,000 copies over the last thirty years.⁴ However, despite its significance, GWW is a bit of a mess. The sound quality was certainly good but the collection of tracks was incoherent: sides one and three of the album were recordings by Dylan in Minneapolis in December 1961; the first half of side two was of some studio outtakes from 1965 and 1966; while the latter half of side two, and the whole of side four contained the *Basement Tapes*.

Dylan's record label, Columbia Records, recognised the ramifications of this episode but could not pursue the bootleggers as they had no idea who they were. Furthermore, they were not entirely sure what rights they had to the material that had been issued: sound recordings were not protected under US law. Columbia did not know whether Dylan had signed with them by the time he made the Minneapolis tapes and, even if he had, Dylan had been a minor when he signed. Also, the tracks on the Minneapolis tape were all public domain songs and Dylan had never copyrighted his arrangement of them. Furthermore, Dylan had been between recording contracts at the time he made the Basement Tape material and they were not recorded in a Columbia studio. The original acetate had been a demo by Dylan's song publishers, not his recording company. Although the publishers and Dylan could claim copyright infringement on the publication of the underlying work, it was difficult to see what legal

⁴ Because of the nature of bootlegging, it is extremely difficult to ascertain any reliable sales figures. This problem is exacerbated by the fact that a successful bootleg will be released under a number of different names by different manufacturers. Thus, although the actual GWW may only have sold a few thousand copies, the many copies of the album have sold a lot more.

claim Columbia had. According to Dub 'they could sue us for name and likeness, or not paying royalties or something like that, but there was no actual law against what we did.'⁵

The floodgates had opened and within a few months there were a further half dozen Dylan titles, though most were poorer quality than Dub and Ken's releases and most copied the tracks from GWW. Up to this point, all bootlegs had been of Dylan, and all had included unreleased studio recordings. Record companies consoled themselves that there was obviously a finite amount of such material available. When the Stones announced their Winter 69 US tour, however, pioneer Dub moved on to the next stage of bootlegging. With his profit from GWW, he bought state of the art equipment and recorded six shows. The quality of the recordings surprised everyone, and the second show at the Oakland Coliseum became the first live bootleg – *LiveR Than You'll Ever Be*. The show was on 9 November and the boot was out before Christmas.⁶ The recording quality of *LiveR* led to a review in *Rolling Stone* which suggested that the recording was an inside job, recorded from the soundboard.⁷ London Records were paranoid about their 'leak' and issued a press statement saying that board tapes had been taken at Baltimore and New York but not on the West Coast. *LiveR* was as important a landmark as GWW, for it established the potential and showed the demand for good quality live bootlegs.⁸ Since that point, it has been live material that has formed the basis of the majority of bootleg recordings.

The first wave of bootlegging all happened in the last six months of 1969, and all happened on the West Coast. This was for two reasons. Firstly, there was a large number of vinyl pressing plants in Los Angeles and San Francisco. It was therefore not difficult to find one with no loyalty to the major labels that would press a few hundred discs with no questions asked. Secondly, the West Coast was home to the countercultural ethic at this time. There can be no doubt that much of the inspiration behind these early bootleggers was a countercultural challenge to the monolithic, conservative record labels:

⁵ Cited in Heylin, 1994, p.50

⁶ 'Boot' is the generally used abbreviation for a bootleg.

⁷ For a definition of a 'soundboard', see next section.

⁸ 'LiveR sold a lot, it would be tens of thousands, not 200,000 or anything like that, but over a period of six years, seven years.' Dub, quoted in Heylin, 1994, p.65.

Our goal is very simple. We wanted to put the record companies out of business by simply giving the fans what they want and at the same time not screwing the performer.⁹

We realised that these guys [US bootleggers] were only in it for the money. For us it was a much more radical thing...[we wanted to] undermine the whole record industry.¹⁰

The record industry had been pushing for the protection of sound recordings for some time but a bill proposed by Senator McLellan was defeated in both 1968 and 1969. If the labels were going to push the bill through, they needed to exaggerate the impact of bootlegging. This resulted in some enormous sales figures being quoted: a quarter of a million for GWW, 200,000 for LiveR and 100,000 for the first Beatles' bootleg, *Get Back*. It also led to some hyperbolic statements regarding the impact of bootlegs. In 1971, the year the bill finally passed, the vice-president of Warners stated 'if bootlegging were to continue indefinitely the entire structure of the music industry as we know it would be absolutely destroyed.'¹¹

The introduction of the McLellan Act, which came into force on 15 February 1972, signals the end of the first phase of bootlegging when outlaw heroes such as Dub and Rubber Dubber withdrew from the business. As a final act of defiance, Dubber stamped his famous moniker all over the executive toilets of Warners in LA. However, the McLellan act was really only an anti-piracy measure, not anti-bootlegging. It protected sound recordings but did not grant any rights to performers. Significantly, it did not protect unpublished recordings and McLellan was not retroactive – it only protected sound recordings made after 15 February 1972.

This brief history of the early days of bootlegging has introduced many of the important features of the phenomenon under study. It has illustrated the content of most bootlegs – studio outtakes and live performances – and shown the labels' responses to the early bootlegs which are characteristic of the approach labels have taken to bootlegs ever since. It has also pointed to the countercultural ethos that drove much early

⁹ Rubber Dubber in Harper's Monthly, Jan 1974, quoted in Heylin, 1994 p.82. Rubber Dubber was the first bootlegger to put out material better sounding than Dub. He converted an old rubber fin factory into a pressing plant and was the darling of the underground press, willing to give interviews justifying what he did. All of his releases came with a stamp on them that said 'yours truly, Rubber Dubber' and a retail price of \$6.

¹⁰ Marc Zermati, founder of Sky Dog records (a Dutch bootleg label) in Heylin, 1994, p.154.

¹¹ Rolling Stone 14/10/71.

bootlegging. I shall now provide a more analytical overview of some of the features of bootlegging.

Where do bootlegs come from?

The majority of bootlegs feature either recordings of live concerts or recordings of studio sessions where songs that were recorded did not make it onto the finished album. Recordings of live concerts come from two possible sources: audience recordings and line recordings. A line recording is one which has been recorded directly from a feed from the concert so there is no background noise on the recording. Line recordings are often incorrectly referred to as 'soundboard' recordings. Indeed, 'soundboard' has come to refer to all recordings which are not audience recordings. Literally, a soundboard recording would be one that has been made directly from the output of the mixing desk at a concert. Soundboard tapes are 'made either by the mixing engineer or his assistant, either for the artist or for their own amusement.'¹² Thus the claim made by the IFPI's Martin Schaefer that 'recordings of high quality are obtained by bribing the sound engineer to plug a line into the mixing board'¹³ is an exaggeration and an example of how the legitimate industry exaggerates the furtiveness of bootlegging. The few soundboard tapes that do get released tend to come from a mixing engineer or, often, the artist themselves because they feel that the show was good enough to warrant a wider audience and not because of bribery. Artists purported to have ensured tapes of their shows reach a wider audience via bootlegging include Mick Jagger and Keith Richards, David Bowie and Eddie Vedder.¹⁴

Bootleggers have no need to bribe engineers because line recordings are sourced from more varied avenues than the soundboard: some bands support 'tapers' sections' at shows where tapers can plug directly into line feeds; line tapes have even been made by using a special facility for the hard of hearing in US venues that supply a low level FM broadcast of a show.¹⁵ But by far the dominant supply of line recordings for bootlegs comes from TV and radio broadcasts. These recordings have already been mixed by the broadcaster so that they sound the best for living room listening. Transcription discs of early radio broadcasts are particularly prized as they have a greater sonic range than a recording of the broadcasts themselves. Apart from early radio shows, the majority of

¹² Joel Bernstein, archivist, quoted in Heylin p.254.

¹³ In Hennessy, 1992b.

¹⁴ For an account of artists' attitudes towards bootlegs, see chapter 9.

radio sources for bootlegs feature either live sessions or FM concert broadcasts. In the US in particular, broadcasting shows is used as a way of promoting a tour before it hits town. These broadcasts will invariably end up on a bootleg. Springsteen in particular used this form of promotion and this is the reason for a good number of 'soundboard' bootlegs of Springsteen's mid 70s concerts.

The other source of concert recordings available to bootleggers comes from audience tapes. An audience tape is simply when a member of the audience smuggles a recorder into the venue and records the show. Today almost every show by a major artist will be taped. However, the relationship between the bootlegger and the taper is quite tenuous and reflects the ambivalent relationship between tapers and bootleggers. Tapers are often strongly opposed to bootlegging and so they would not directly give sources to a bootlegger. However, once a tape is in the public realm through trading (particularly with digital media) then it can eventually fall into a bootlegger's hands. The transfer from audience recording to bootleg is not nearly as surreptitious as the record industry makes out and the ease with which a recording can be reproduced now means that audience recordings are practically worthless as a commodity and so bootleggers are rarely involved in the cloak-and-dagger purchases of concert recordings that are suggested by the industry.

Where tapes sometimes do change hands for money, however, is with studio recordings. Studio recordings are obviously less available than concert recordings and are more desirable for bootleggers. While studio tapes are bought by bootleggers (someone with a tape is willing to let it go for, say, £500), the amount that is paid is much smaller than the record industry imagines. Because the record industry exaggerates the sales of bootleg records, it also exaggerates the amount of money for which studio tapes change hands.

The one time that tapes could be bought for anything like the figures proposed by the industry was during the 'protection gap' era of the early 1990s (discussed below). During this period, bootleggers were able to achieve higher sales figures than usual and these increased sales meant that they could spend more on sourcing tapes. The most significant protection gap bootlegger, Dieter Schubert, paid \$10,000 for an album's worth of pristine Beatles' outtakes from the Abbey Road vaults. This price sent shockwaves through the bootlegging world.

¹⁵ Michael Saunders and Jim Sullivan, 2000, 'A boost in bootlegging technology', Boston Globe, 31/7/00, p.B08.

However, not all studio tapes have to be purchased. The reason that so many studio tapes escape from the industry is the number of people who have access to them in the first place: sessions are recorded by engineers and session men for personal use or to impress girlfriends; demos reach A&R men who play them to interested parties, who has a friend who is a collector... the number of people who have access to these recordings, coupled with the number of collectors wishing to get hold of them makes it extremely difficult to keep them under wraps. A number of studio recordings filter into tape trading circles before being turned into a commercial bootleg.

The carelessness of the record labels almost creates an air of collusion regarding the release of studio recordings. CBS records lost hundreds of master recordings from Dylan, Presley and Johnny Cash among others when they sold a warehouse in Nashville without checking its contents first. Similarly, one of the major finds of the 1980s was a series of outtakes from some of the Stones' most prolific sessions at the Olympia Studios in London. The tapes were recovered from a skip when the studio closed down.

The scale of bootlegging

The claim is always that these are all collectors, that they just do it for the sake of the music, that they only do 1,000 or so of each tape, and that a 10,000-unit run is like the maximum they've ever seen. That may be true for some small segment of the bootleg population. But there's definitely big-time commercial criminals involved. They're not investing in four-color glossy jackets for a 1,000-copy run; they do major runs, they do 50,000 to 100,000 units of someone's product.¹⁶

What should become apparent from this research is that, contrary to record industry statements such as the one above, bootlegging is quite a small scale activity. Even during the exceptional period of the protection gap, the top selling protection gap CD probably only sold around 100,000 copies.¹⁷ Today, following the closure of the legal loopholes, the scale of bootlegging has reverted to its more normal levels. A regular pressing of a bootleg title is about 500 copies worldwide. A very successful bootleg would then go to a second pressing of another 500 copies, but this is rare. According to Heylin, anything

¹⁶ Joel Schoenfield, then head of RIAA Anti piracy unit in Vettel, 1986.

¹⁷ Clinton Heylin, the leading authority on bootlegging, email to the author. Flanagan reports that *Ultra Rare Trax* sold 'in excess of 100,000' (1994, p.47).

in the region of 3,000 sales would be considered enormous in bootlegging circles.¹⁸ There are two comparisons with the legitimate industry that are here worth mentioning. The first of these is with the sales figures of regular albums. *Born in the USA* by highly bootlegged artist Bruce Springsteen sold ten million copies. The best selling album of 1998, the soundtrack to *Titanic*, sold 25 million copies. Although these are the more successful titles, the break even point for a regular release is around 300,000.¹⁹ The highest successes of the bootleggers would still rank among the most dismal of failures for the mainstream industry. However, perhaps a more pertinent comparison can be made with the number of promotional CDs *given away* by the industry when a new album is released:

Now I don't know the figures but I'm quite sure that more than 1,000 promotional CDs get given away when an album gets released. I just read something with Chrissie Hynde saying that Dylan's office had sent her a copy of *Time out of Mind* and she really enjoyed it and I'm thinking "hang on a minute... *Dylan's office* sent Chrissie Hynde a copy of *Time out of Mind*? She doesn't review it; she could probably afford to buy her own copy..." They've got to be giving more than 1,000 copies away and bootleggers are only selling 1,000 maximum worldwide.²⁰

The sales of bootleg records are comparatively small because the number of fans interested in the secret history of recording is also comparatively small. Heylin estimates the number of fans buying bootlegs to be between 100,000 and 200,000.²¹ As an indication of the possible market for bootleggers, it may be worth looking at subscription figures for fanzines of the major bootlegged artists. Taking Dylan as an example, the subscription figures (worldwide) of the three main UK fanzines are: *Isis* 1800, *The Bridge* 1300 and *Dignity* 800.²² Although these figures are not an entirely accurate representation of Dylan's bootleg buying fans, they do provide an indication that the catchment area for the market is smaller than the record industry states.

¹⁸ Interview with the author.

¹⁹ Lewis, 1990.

²⁰ 'John', a bootleg retailer, interview with the author. The Mechanical Copyright Protection Society (MCPS) permits 300 promotional copies to be free from mechanical royalties so this could be expected to be the maximum number of promotional copies distributed. However, a label can claim for any amount of free goods in an artist's contract so there is scope for this figure to be higher. A former employee of Polygram told me that on a promotional campaign he worked on, the label gave away 850 promotional copies in three days.

²¹ Flanagan, 1994, pp.46-47.

Although this quantitative data offers some indication of the scale of bootlegging in comparison to the legitimate record industry, it is to some extent difficult to empirically ascertain. What is equally important to take into account, however, is the qualitative data if we are to have any indication of the potential impact of bootlegging upon the industry. What type of music fans are involved in bootlegging?

Bootleg fans

The individuals who collect bootlegs are in general the most committed fans that an artist has. As Schwartz states, 'bootlegs appeal most to diehard fans who want everything.'²³ Fans, Lewis argues, are 'the ones who can tell you every detail about a movie star's life and work, the ones who sit in line for hours for front row tickets for rock concerts.'²⁴ Fans are traditionally viewed with hostility, or at least suspicion, by the rest of society.²⁵ Neumann and Simpson emphasise this fact concerning bootleg collectors, pointing out that it 'is undoubtedly labeled as a criminal or deviant activity.'²⁶ The literature on fandom is just beginning to develop, but cannot be covered here. For the purposes of this study, it is important to note that it is *fans* rather than casual consumers who buy bootlegs. The fans involved in buying and collecting bootlegs are the hardcore fans, who already own all of their artist's official releases and need more. They are the ones who 'spend an abhorrent amount of money on live entertainment...and buying many records'.²⁷

It is almost a cliché to describe the type of fan that collects bootlegs. In this section, therefore, I want to focus on the reasons *why* fans collect bootlegs rather than merely describing the fans themselves. Studies of fandom, particularly the one undertaken by Cavicchi of Bruce Springsteen fans, will obviously prove useful for this analysis. However, to understand why people collect bootlegs we must return to the notions of authenticity that were discussed in chapter 5. In particular, we must look at the prioritisation of live performance. To re-quote Geoffrey Himes, 'live performances have always been the most intense, most revealing experiences in pop music.'²⁸ And the live performance is the place where there is no safety net, where the artist cannot start

²² Figures gained from the editors.

²³ Schwartz, 1995. (no page number as it is off the internet).

²⁴ Lewis, 1992, p.1.

²⁵ See Cavicchi, 1998, p.6.; Lewis, 1992.

²⁶ Neumann and Simpson, 1997, p.321.

²⁷ 'Aquaboy', email to the author.

²⁸ In Frith, 1998, p.68.

again or make an overdub. The live performance is honest (in front of a thousand watching eyes, the musician has no way to pretend to be something he is not) and exciting (it is where the energy of the experience results in the unexplainable flashes of genius that form the bedrock of Romantic conceptions of creativity). And because the live concert relies on the humanity of the artist rather than the mechanisation of the production line, the live experience is where differences occur, where the same song is different night after night. This mentality that sees each live show as a unique experience is significant for it offers a contrast to the eternal sameness of the albums produced by the record industry.

...most fans see Springsteen's live concerts on tour as varying considerably from night to night, shaped by different song lists, arrangements, solos, introductory stories, and, depending on the chemistry of the venue, the audience mood, the weather, and so on, different degrees of joy, rage, introspection. Even when Springsteen presented highly choreographed and unchanging shows... fans – despite some complaints – continued to find and value differences from show to show.²⁹

The focus on the live experience is in contradiction to the record industry where the studio produced album is seen as the finished product. This is the opposite to what many fans believe:

That musicians must create a work, a product, and then go 'on tour' to 'support' it is belied by the fact that most fans see Springsteen's creative process the other way around: for them, the tour is primary and the work – which the tour is supposedly supporting – is secondary.³⁰

Fans who feel that live performances are the more significant part of an artist's work are the ones who are more likely to collect bootlegs. They feel that the legitimate industry cannot successfully document the continually changing nuances of live performances. This is because the legitimate industry is concerned with producing a product, whereas these fans see creativity as part of an ongoing process that occurs through regular live performance. So fans rely on bootlegs to capture these moments of inspiration that occur

²⁹ Ibid., p.73.

³⁰ Cavicchi, 1998, p.74.

live on stage. Bootlegs, in this understanding, are the only way to document the process of creativity. This is also the reason that studio outtakes are considered so important – they allow the collector the chance to be part of the process, to hear how certain songs develop or to understand why particular songs did not end up on the album. One collector stated ‘I like to trace roots of tracks and see how the official discs “grow”.’³¹ Although why a certain song did not make an album is sometimes hard to fathom. One thing that bootlegging effectuates is that, by circumventing the artist’s decision, bootleggers highlight that an artist’s judgement is often fallible. Fans often refer to this; one collector said ‘I don’t always want to be limited to the official studio/live releases as these aren’t always the artist’s best work, despite what they think.’³²

This is the aesthetic ‘justification’ of bootlegging: bootlegging exists because live recordings offer variations and aspects of a musician’s work that cannot be adequately covered by the record industry. Fans view bootlegs as ‘an important part of rock ’n’ roll history because they document thousands of significant moments that occur outside the aegis of the record labels.’³³ Bootlegs capture the moments of inspiration that are the ideal of the live experience.

There are other reasons that fans collect bootlegs, however. The first of these is that it enables the fan to actively and continually engage with the artist’s career. By being a fan, an individual is involved in a continual process of engaging with the object of fandom. Bootleg collectors are very likely to have bought all of their artist’s official releases already but, given the long delay between albums in the legitimate industry, legitimate releases may not satisfy the needs of the fan to keep in contact with the artist’s work. Bootlegs are one way of engaging with the artist when he is not immediately available for touring or releasing a new album. They allow the artist’s work to be seen as a living organic entity rather than as a hypostasised product and they allow an appreciation of aspects of an artist’s career that may not have been well documented by official releases:

There are so many hidden treasures that as a “legal” fan you’d never get to appreciate. I’m 26 – I’d never have heard 69-73 live renditions of *Midnight Rambler* that go to the depths of my soul, never have heard live versions of *Gimme Shelter* which make the hairs on the neck stand on end.³⁴

³¹ ‘Delmere’, email to author.

³² David, email to the author.

³³ Flanagan, 1994, p.38.

³⁴ ‘Bog’, email to the author.

With Dylan, I felt I rediscovered a great artist through the bootlegs, a side of his art not really documented officially very well.³⁵

This allows the collector to engage in an ongoing critical relationship with the artist's work:

... live boots from past times open up doors which allow a better appreciation of the band and how it has changed. Having a collection which spans decades of a band's history lets me see how they've changed.³⁶

In my experience, the "official" albums of an artist only tell a small part of his or her story.³⁷

This process of engaging with the work also enables bootleg collectors to feel closer to the individual artist. By continually engaging with the artist's work, rather than having an irregular relationship based on periodic release of new work, the fan can trace the development of their artist as a 'real person', outside of the record industry machinations. This quote from Cavicchi is illustrative:

If one accepts Bruce Springsteen's musical work as a commodity, then one has to look no farther than the Springsteen CDs and concert tours promoted by Columbia Records. There are no "Springsteen performances" outside record company marketing; they are synonymous. However, if one accepts Bruce Springsteen as an artist who happens to have signed a recording contract with Columbia Records, then one has to take into account the possibility that Springsteen's creativity extends beyond what Columbia Records promotes.³⁸

Bootlegs are seen as a means of getting to know the individual outside of the record industry structure. They are a means of overcoming the distance between artist and fan

³⁵ Gary, email to author.

³⁶ 'Bog', email to the author.

³⁷ 'Uncle Sween', email to the author.

³⁸ Cavicchi, 1998, p.72.

created by the commodification of music. One fan stated ‘having some of his interviews and things that are on the bootleg tape, it’s just like hearing him talk and be a real person...made him very real to me. It was important to hear that he was really a real person.’³⁹

There are other reasons that people collect bootlegs. One reason is to recreate the experience of the concert, either their own personal experience or a ‘virtual’ experience of a show far away in space or time. Many fans view concerts as the time when they can be closest to the artist, diminishing the distance between them that builds up through the record industry. A recording of a show is thus an attempt to recreate that broken down distance, Bootlegs are an attempt to recreate the experience of intimacy away from the space and time of the concert venue. One fan stated that bootlegs ‘give a Pole a chance to see/hear who Bob Dylan is, to let me appreciate him even without being close to him...I cannot really see Bob live, so I’m happy just to listen to a tape and imagine I’m at a show. It’s funny to “witness” a show fifteen years before I was born.’⁴⁰ Neumann and Simpson have documented how collectors use concert recordings to attempt to recreate the concert experience and have described how collectors use their bootlegs as a way of authenticating themselves as individuals.⁴¹

The final reason that I shall only briefly mention here is the importance of archiving. Many collectors interviewed talk in terms of archiving, history and libraries.⁴² Collectors see themselves as fulfilling an important social function – documenting facets of important recording artists that would otherwise be lost forever.

All of the above reasons to some extent rely upon notions of authenticity that stem from the Romantic ideas discussed in the first half of this thesis. Bootleg collectors are seeking to communicate with the authentic artist, the real person that exists before he enters the commercial sphere. This type of collecting affirms the Romantic dichotomy of an artist staying on the outside of commercial influence and, ironically, helps to authenticate the artist in the mainstream, commercial, world as I shall indicate in the next chapter.⁴³ I shall discuss the ramifications of this in the chapter 10.

³⁹ Quoted in Neumann and Simpson, 1997, p.333.

⁴⁰ Artur, email to author.

⁴¹ 1997, pp.336-339.

⁴² Ibid., pp.329-331.

⁴³ The quest for authenticity is countered by the fetishising nature of collecting: the tour becomes a draw full of dated tapes, the star becomes a series of mediated images (Neumann and Simpson detail how a catalogue of bootleg Springsteen videos lists how far away from the stage the video is, whether it is a head shot, full body shot etc.). Bootleg collecting intensifies the dialectic of authenticity and

A model of bootlegging

The reasons why fans collect bootlegs that I have just detailed are, I believe, reasonably uncontroversial. What is far more controversial is the nature of the bootleggers themselves.⁴⁴ Many of the collectors quoted above would argue strongly that they are very different from bootleggers because they do not seek to make a profit out of their tapes. Indeed, tape traders are often the most vicious in their descriptions of bootleggers: bootleggers are blood-sucking leeches making money off an artist's creative powers without giving anything in return.⁴⁵ This is also the portrait that is drawn by the record industry. What seems most contentious is whether bootleggers are music fans. Both the record industry and tape traders argue that if they are free-loading off artists, they cannot be fans. Yet throughout my research, in interview and participant observation, and in over ten years of being part of this subculture, buying bootlegs at many record fairs and conventions, and meeting scores of bootleg retailers, I have never met a retailer who was not a dedicated music fan. Bootleggers certainly put themselves across as being music fans. The vast majority of bootleggers entered bootlegging because they began by buying them.

Most retailers sell all artists so yes, some of it is just production, they've got to make a living, but there is almost always a core element that they are particularly interested in, that they have a particular involvement in, and are very keen to ensure that the right stuff comes out. And as long as there is somebody for each section – somebody else is interested in Prince or whatever – and they are the ones who are instigating the majority of the stuff that is coming out, then everybody is getting a good deal out of it.⁴⁶

The record industry has painted a vivid picture of bootlegging as a high level crime syndicate, infested by people with no interest in music. The record industry is constantly

fetishisation that occurs in the mainstream industry. Due to space, this relationship shall not be pursued here.

⁴⁴ In this thesis, I use the term 'bootlegger' to refer to someone who either manufactures or retails bootlegs. This is slightly incorrect as, technically, a bootlegger is someone who makes bootlegs. However, there is a great deal of crossover between the two groups and they share many of the same viewpoints. For reasons of space, therefore, they are discussed together in this thesis.

⁴⁵ One collector said to me 'I know that many people feel that bootleggers are in league with the devil, while tape traders are in league with God.' 'Hollis', email to author.

⁴⁶ 'John', interview with the author.

linking bootlegging with organised crime, particularly the more morally dubious such as drugs, arms smuggling and pornography.⁴⁷ An Evening Standard report in 1994 linked bootleggers to the IRA.⁴⁸ The reality, however, is much different: bootlegging is not a large scale organised crime, it is inherently fragmented and small time: 'bootlegging, by its very nature, qualifies as disorganised crime... there is no conspiracy, no "Mr Big".'⁴⁹

The RIAA has been saying for a long time that bootlegs have gone past the stage where they are "recordings by fans for other fans." They will tell anyone who will listen, that there is a high level of organized crime involved with modern bootlegs. To anyone who has spent a lifetime on the periphery of the bootleg world, this is laughable.⁵⁰

It is important to discount the links between bootlegging and organised crime here. I have found no evidence in any of my research linking the two and in interviews the idea was met with contempt:

...bootleggers are total chaos. The opposite of organisation is generally the rule of bootleggers. There are very few people that I've come across in the retail manufacturing area of bootlegging that are anything more than a cottage industry doing stuff largely because they want to do it.⁵¹

There are a couple of people in America with underworld connections who were involved in distributing bootlegs and running protection companies, and the real bootleggers were scared shitless of them. It was all copying of other people's bootlegs, we can't create anything...but...you know, we can take over their distribution, that kind of thing. But nevertheless, these were real [crooks]... Whereas, in the real bootleg world it is all about broken promises. You offer to sell 200, there are 178, there are no covers, it is disorganised crime. That is the whole point of it, they are all, you know...I am not saying that some people haven't made money out of it, but they are all small-time entrepreneurs who really are doing this because they can't

⁴⁷ For example, Ellison, 1993. The BPI anti-piracy pamphlet states that many 'are closely linked to activities such as terrorism, drug trafficking, pornography and money laundering.'

⁴⁸ Luke Blair, 'Bootleg CDs "funding IRA"', Evening Standard 25/7/94.

⁴⁹ Heylin, 1994, p.11.

⁵⁰ Bill Glahn (ed.), 1997, Live! Music Review, 5:4, p.7.

⁵¹ 'John', interview with the author.

think of anything better to do with their time. They don't want a 9 – 5 job, and as I say, the irony of it is most of the serious ones are music fans, because it is not worth the aggro if you are not a music fan. There are things that you can do that are closer to the middle ground that will make you as much money, knocking off Versace suits, I don't know what. But if what you actually want to do is just make money doing dodgy stuff, why do bootlegs?⁵²

The fact that bootleggers emerge from the wider fan group whose motivations have already been described is a crucially important element of bootlegging. I now want to draw together the elements of bootlegging that have been sketched out here to give an overall impression of bootlegging. These elements, to a greater or lesser extent, exist in all cases of bootlegging but are described here as a sort of 'ideal type' of bootlegging.

The first element of this ideal type is the aesthetic justification that I described earlier. Based on an ideological prioritisation of live performance, bootlegging occurs as an attempt to capture for posterity many moments of rock music creativity that would otherwise be lost. Furthermore, it is an attempt to disperse these moments of popular culture by creating an alternative means of distribution. This is because the record industry is viewed as either unwilling or unable to adequately reflect this type of creativity. While bootlegging creates its own problems of fetishisation, collectors believe that these channels of production and distribution offer the best way of diminishing the distance between the artist and themselves.

The second element concerns the prioritisation of aesthetic impulses for production over economic ones. In the legitimate industry the use value of the product (the aesthetic content) is subservient to its exchange value. In bootlegging, this prioritisation has been reversed: the aesthetic content is more important than the exchange value. This means that there is an inherent quality control in bootlegging. This is the outcome of three things. Firstly, it is because the people who manufacture bootlegs are fans of the music and thus have a similar desire to 'share the music' as tape traders and ensure that it is the best bits that get put onto bootleg. Secondly, the knowledgability of bootleg buyers is very good and this means that bootleggers have to produce a high standard product in order to meet the demands of the market, particularly as buyers can listen to the bootleg before they buy. Related to this is the third factor, which is the small scale economies of bootlegging. Because of the small size of bootleg production,

⁵² Heylin, interview with the author.

bootleggers must ensure that they have the best quality source tape before committing it to CD. If they do not, and another bootlegger has a better tape, the knowledgability of fans will ensure that they do not sell many of their title. One of the essential differences between the bootleg and the mainstream industries is that there is a great deal of competition between manufacturers in bootlegging. This impels them towards putting out good quality products.⁵³ These three factors all stem from the knowledgability of a fan community that includes both bootleg collectors and bootleggers.

These three factors result in a situation where the aesthetic quality of a release is given a higher priority than the economic value. I am not suggesting that there are no aesthetic decisions made in the legitimate industry, nor that the bootleggers are merely an altruistic conduit ensuring a wide diffusion of the music, merely that there is a quality control in bootlegging that does not exist in the main industry. This means that, despite industry claims, very few bad bootlegs get released:

By and large, certainly on the Dylan front, if you said to me “how many bootlegs are there that really aren’t worthy of being put out on CD?”, I don’t know what the percentage would be, but maybe 5%. The vast majority are at least well intentioned.⁵⁴

It also results in a situation where many commercially unviable bootlegs are released because the bootlegger has a fan’s interest in the work and wants to get it out. An early example would be a label like Sky Dog from Holland who released a Velvet Underground bootleg when the official sales of VU albums were still barely in their thousands.⁵⁵ The best modern example of this is the Byrdman, a current East Coast bootlegger:

The Byrdman buys more tapes than anybody ever in the field of bootlegging, not for that kind of [big] money but for four figures, but only because he’s a fan. He’s just bought 3 hours of Big Star outtakes. But he has the money, he’s a huge Big Star fan and he can probably just about cover his costs of putting it out. No official record company would put out alternate takes of Big Star.⁵⁶

⁵³ Flanagan, 1994, p.47.

⁵⁴ ‘John’, interview with the author.

⁵⁵ Heylin, 1994, p.154.

⁵⁶ Heylin, interview with the author.

The third element of bootlegging, one I have so far not discussed in detail, is the community aspect of bootlegging. Bootlegging and tape trading are social occurrences that enable fans to meet other like minded people. This type of community spirit occurs between traders (many collectors commented upon the lasting friendships they have made through trading), between bootlegger and collector (a browse through a record fair will easily indicate a number of bootleg sellers chatting to purchasers about their favourite artists), and even between competing bootleggers.⁵⁷

The final element of this model is an air of counterculturalism. The illicitness of bootlegging certainly holds some appeal to collectors. As Flanagan states, ‘the illegality of bootlegs is, of course, part of their appeal. It’s music someone doesn’t want you to hear or didn’t want you to take away from the concert, thus making you covet it all the more.’⁵⁸ Many of the collectors questioned for this thesis stated that they did not want the music industry to adapt to their own interests. There is a feeling that the music is more authentic if untainted by the music industry.

I like it [the music industry] as it is. I wouldn’t change a thing. A forbidden fruit is the sweetest.⁵⁹

The other air of counterculturalism comes from the bootleggers themselves. This has obviously diminished from the political radicalism of Rubber Dubber and his like who said they wanted to overturn the record industry. However, but there is still a feeling that there is something wrong with the music industry and its hegemony must be challenged:

It seems to me that we like to think of ourselves as rebels but not actually causing any problems. Anti-establishment without actually being aggressive or negative about anything. And bootlegging, kind of like CB radio, is a way

⁵⁷ ‘Later on I got made redundant from my other job, realised that we’d probably have to stop collecting, that was my first reaction – I’d have to stop doing it because I couldn’t afford it. The second reaction was that I’d have to start selling some of the stuff off because I was trying to set up another business at the time. So I started going through the collection to see what I could just about live without and it was suggested by one of the guys that I used to buy stuff off – “well you know, why don’t you sell some retail?” So I really started doing it to get some money in. And the guys I used to be buying from said “well if you’re not buying off us anymore, we can wholesale it to you.” And they were very very supportive, the guys were effectively very happy for me to set up in competition to them. And that is very much the attitude I’ve come across with bootleggers, that although people are in competition, it’s by and large a lot of camaraderie there, and it’s not nearly as mercenary as it looks.’ ‘John’, interview with the author.

⁵⁸ 1994, p.38.

⁵⁹ Artur, email to the author.

of being a little bit rebellious but without letting it get out of hand. Rock music is rebellious. And collecting bootlegs is just a little bit rebellious.⁶⁰

The ideal type of bootlegging thus consists of four elements. The first of these is the aesthetic impulse for bootlegging which is driven by the belief that live performance is the most authentic music. Secondly, there is a reversal of conventional priorities whereby the aesthetic consideration of a release is more important than the economic factors. Thirdly, bootlegging helps create a feeling of community among fans. Finally, bootlegging contains the traces of counterculturalism, the whiff of rock and roll rebellion.

The 'protection gap'

There was a time, however, roughly concurrent with the development of the bootleg CD, when this model of traditional bootlegging came under threat. This was during the period known as the protection gap. The protection gap was a series of legal loopholes that precipitated a major explosion of bootleg production and threatened to open up bootlegging to a far wider audience than its traditional constituency.

In 1987, Bulldog Records released a Bob Dylan bootleg CD, *The Gaslight Tapes*, in Italy. This was freely available in Italian supermarkets and record stores, and was widely exported (available at both HMV and Virgin stores in the UK). The legality of its manufacture was not in doubt because of the age of the performance. In Italy at this time, the period of protection available to live performances was twenty years, the minimum period set out by the Rome Convention.⁶¹ The Dylan release featured a performance at the Gaslight Café in 1962; 25 years old and public domain in Italy. While the copyright of the song existed for the life of the author plus fifty years, Italy had a compulsory license scheme so that the producers could pay a mechanical royalty to the songwriter in order to issue the song and thus produce the CD. By paying this mechanical royalty it enabled the release to be authorised by the Italian copyright collecting society (SIAE) and it thus became a legitimate release, able to be legally retailed in any store, not just esoteric collectors' fairs.

Bulldog established itself as the first legitimate bootleg label and released a number of CDs highlighting the loophole by placing the phrase 'it was more than twenty

⁶⁰ 'John', interview with the author.

⁶¹ Studio recordings, however, were protected for fifty years.

years ago today...' on their covers. These early CDs, however, were merely transfers of old vinyl bootlegs with no sound improvement. This did not matter to Bulldog, who were high output, low cost manufacturers.

This new type of release was obviously a big concern for the record industry. What made matters worse for them, however, were the EC free trade laws which enabled Bulldog to export to all EC member states once their releases had been stamped by the SIAE. The reason for establishing the EC had been to create an internal market among European countries. This created a difficult situation. If the CD had been manufactured in the UK, it would have been illegal. However, the legal issue yet to be decided was whether a product that had been legally produced in one member state could be considered illegal when imported into another member state? Was the *Gaslight Tapes* illegal when sold in the UK?

The country to which most Bulldog titles were being exported, however, was Germany, as it was both geographically easier and Germany was the largest record buying market in Europe. The IFPI sought an urgent clarification of EC law and took Bulldog to court in Germany over a live recording of a Dylan concert. However, while trying to close one legal loophole, the case merely uncovered another. The Federal Supreme Court in Karlsruhe found that no infringement had occurred as Dylan was not a German national. It ruled that a non-German artist could not claim protection if the performance took place in a country that was not signatory to the Rome convention (or in a signatory country before it had signed up to the Rome convention). If a foreign artist was performing in Germany they would receive the same protection as a German national but if a performance by a non-German took place in any of the following, the performance was unprotected in Germany: Italy before 1975, France before 1987, Japan before 1989, or the US, Spain, Netherlands and Belgium at all.⁶²

The IFPI had merely uncovered another loophole, and protection gap manufacturers now sprang up in Germany as well as Italy. By paying mechanical royalties to the German collecting society, GEMA, German bootleggers could gain copyright clearance and sell their products in any outlet in the European Union. There was a possibility that all the industry rhetoric about bootlegs undermining official record sales would become a reality. This was particularly so as protection gap CDs started out

⁶² Obviously the most important country on the list is the US, but in reality it did not matter to the bootleggers – if the concert took place in a protected country they would just lie (and how were the SIAE or GEMA [the German collecting society] going to know any different?). There is a Van Morrison bootleg listed as 'live in Belgium' when his first spoken words are 'Good Evening Frankfurt!' Heylin, 1994, p.273.

as a more mainstream than specialist commodity.⁶³ Collectors were slow to accept bootleg CDs: most already had large vinyl collections, and the majority of the first protection gap CDs were merely copies of earlier vinyl bootlegs.

It took one special release to alter collectors' attitudes to bootleg CDs. In 1987 a German collector paid the outlandish figure of \$10,000 for an album's worth of pristine Beatles' outtakes taken from the Abbey Road vaults. The collector, Dieter Schubert, was the founder of The Swingin' Pig label and he had discovered yet another loophole in German law: any unpublished recording made in another country before 1966 (when Germany ratified Rome) was public domain in Germany. He put the tracks he had bought together with some previously existing acetates and released two CDs – *Ultra Rare Trax vols. 1 & 2* – in late 1988.

The effects of *Ultra Rare Trax* is second only to GWW – bootlegging had entered a new era. The sound quality of these discs was so good that it was obviously an inside job.⁶⁴ These discs showed the true potential of the new CD medium. EMI was mortified, and Swingin' Pig became the prime target for the IFPI. Schubert pressed on, however. In 1990 he released *Basel 1990*, an unexceptional audience recording of The Rolling Stones in Switzerland just two months earlier. It was certainly legal under German law (Switzerland not being a signatory to Rome) but no one had dared to put out anything so recent. *Basel 1990* was designed to test the waters: Sony's injunction failed to establish any *a priori* right to The Stones' live performances and Schubert went for his biggest coup, *Atlantic City 89*. This show had been a pay-per-view broadcast on US TV in December 1989 by The Stones. Schubert released it in a deluxe twelve inch box set, in superb quality and pre-empting Sony's own disappointing tour souvenir *Flashpoint* by a good six months.

Due to America's failure to sign the Rome convention, there was little Sony could do. Though they ingeniously claimed infringement on a thirty second tape loop used during the intro to *2000 Light Years From Home*, Schubert merely edited the offending segment out. Sony then tried to claim infringement on the cowbells at the start of *Honky Tonk Women* but this was refused. *Atlantic City 89* sold a reported 70,000 copies.

⁶³ Oddly enough, the industry at this point seemed to accept that bootlegs did not really damage legitimate sales. Martin Schaefer of the IFPI stated 'the majority of buyers of illegal bootlegs are usually hard core fans who tend to acquire everything - legitimate and illicit - available by their favourite artists. But the protection gap repertoire is being professionally marketed by well organised companies and handled by major distributors. This repertoire can definitely undermine sales of artists' official recordings.' In Hennessy, 1992a.

Atlantic City 89 had a huge impact. Firstly, it firmly and publicly established the protection gap ruling in Germany. Secondly, it took bootlegging well beyond its traditional constituency of specialist collectors. Because the protection gap CDs were for sale in mainstream outlets, they became associated with the concert souvenir. Bootlegs of previously unbootleggable acts such as The Eurythmics and Midnight Oil began to emerge. Thirdly, it sent other manufacturers off searching for 1990 recordings. A half decent recording from 1990 sounded much better than most 1960s recordings and so the bootleggers had a new era to exploit. Finally, and much to the dislike of the traditional bootleggers, the protection gap returned bootlegging to the head of the record industry's priorities, following a spell in the mid 1980s when it had been overtaken by home taping.

The 'protection gap' was thus actually a series of legal loopholes in Italy and Germany and could be interpreted as a great boon to bootleg collectors.⁶⁵ However, the protection gap provided a threat to traditional bootlegging. By making bootlegging quasi-legal, it encouraged a large number of small time entrepreneurs to enter the industry. Flanagan (1994) details how these entrepreneurs had no particular interest in the aesthetic side of bootlegging but saw it as a means to make some easy money. It was easy to copy other peoples' CDs of live shows and put them out on a new label. A traditional bootlegger like Byrdman complained about the mercenaries in the business: 'there is, dare I say, a moral line in the sand between the newer stuff and the older. There are the smaller, crafty, interesting releases, and then there's the monolithic, predictable stuff covering every major tour by every major artist.'⁶⁶ Heylin concurs, arguing that it was the American bootleg labels like Vigotone II and Whoopy Cat that were most in keeping with the spirit of bootlegging, despite existing in 'the most legally unfavourable climate in the world.'⁶⁷ He concludes that 'the CD revolution has uncovered a vast amount of wonderful archival material, but it has also poured more product out into the world than the traditional bootleg market can withstand.'⁶⁸ In short, the aesthetic quality control elements of traditional bootlegging were threatened by the protection gap era. The target market was no longer specialist collectors with good knowledgability, but the casual punter who may be unaware of the lesser sound quality of older concert

⁶⁴ Webb, 2000, focuses on the likely source of these tapes and suggests that they are the result of a young balance engineer being given the task of cataloguing all Beatles sessions.

⁶⁵ A similar loophole also emerged in Australian law, where performances were only protected for twenty years.

⁶⁶ In Flanagan, 1994, p.41.

⁶⁷ Heylin, 1994, p.375.

⁶⁸ Ibid., pp.375-376.

recordings. There was the possibility that all the predictions that the record industry had always made about bootlegging were about to come true.

The IFPI obviously had to act to abort this impending bootleg apocalypse. They put pressure on SIAE to delay the licensing of protection gap CDs, often targeting specific artists' releases. This was only a short term measure, however, and they also instigated a number of legal cases against protection gap labels in search of a more permanent solution through the closure of the loopholes.

The most significant case was brought by Warners against protection gap label Imtrat.⁶⁹ Imtrat was not a traditional bootlegging label but one whose founders had entered the industry tempted by the seemingly easy pickings available. Warners' case revolved around a Phil Collins CD, *Live and Alive*, recorded at an American show in 1983.⁷⁰ Under German law this performance was not protected because it was by a non-German national in a country that was not a signatory to the Rome Convention. If Collins had been German, however, the show would have been protected. Warners argued that under EC law, any legal protection offered to a citizen of a member state must also be provided to citizens of any of the other member states. Copyright legislation, they argued, could not discriminate against citizens of other member states. This was affirmed by the European Court of Justice and the most significant protection gap loophole was thus closed. This ruling meant that any recordings by The Beatles, Stones, Led Zeppelin, U2, or even an American artist like Dylan if he had an English musician in his band (as he did in 1992) were now off limits to the protection gap labels.

This only began to close the protection gap, however. The process has been hastened by European harmonisation of copyright laws but the most significant efforts to close the protection gap have come from another source: the shift from multilateral copyright agreements to international trade negotiations in order to strengthen intellectual property protection. I shall discuss this issue in the afterword, and examine whether traditional bootlegging can survive much into the future.

In this chapter, I have given an overview of the bootlegging phenomenon. Following an explanation of the sources of bootlegs, I have discussed the types of people that both manufacture and collect bootlegs, suggesting that the drive behind bootlegging stems from ideas of authenticity that were discussed in chapter 5. In the next chapter I

⁶⁹ Phil Collins V Imtrat Handelsgesellschaft mbH and Patricia Im, European Court of Justice, 20/10/93. celex: 692J0092.

⁷⁰ Warners and Collins claimed that they had lost at least £1 million from sales of the bootleg (John Carvel, 1993, 'EC judgement bars bootlegs', *The Guardian*, 21/10/93, p.5).

shall analyse how bootlegging affects the mainstream record industry and look at how the record industry has responded to bootlegs, including what artists themselves think of bootlegs.

Chapter 9

The impact of bootlegging upon the record industry and the industry's response

I don't think the record company loses one cent on a bootleg. If they go after bootleggers, they're wasting their money.¹

Public statements by record industry representatives often claim that bootlegging has a serious, detrimental impact upon the record industry. Such a claim, however, is not so clear cut. In this chapter I will outline the arguments used by the record industry against bootlegging. I will firstly discuss the economic arguments. However, as I explained in chapter 6, a record company cannot rely solely upon economic arguments in a battle against piracy as economic arguments rarely capture the public's attention. Therefore, I shall also analyse how the record industry uses the author as the key figure in their anti-bootleg rhetoric. Before this, I shall outline what the artists themselves think about bootlegs. Finally in this chapter, I will discuss some of the archival releases made by the legitimate record industry and see if these moves can be successful as an attempt to subvert the bootleg market.

Economic arguments against bootlegging

The first argument used by the record industry is that the artist is 'robbed' of royalties by bootleggers. I will leave the record labels' own questionable approach to artist royalties until later in the chapter. Here I want to look solely at the economic aspects of this argument. The first question to ask here is whether an artist can lose royalties on something she has chosen not to release. The artist does not lose royalties to bootlegging the same way that she loses royalties to counterfeiting. It is not as simple as equating one bootleg sale with one lost royalty payment as I will explain below.

But even if we accept the record industry argument in this instance, how much royalties do artists actually 'lose'? We have already mentioned the small scale of bootlegging: let us assume that a successful Tom Waits bootleg sells 2,000 copies. Bootlegs in the UK currently retail around £15 for a single CD. However, the biggest profit margin in that figure is the retailer, who gets a mark-up of approximately 50%.²

¹ Max, a bootlegger, in Vettel, 1986.

² Flanagan, 1994, p.47.

This means that the manufacturer sells his supply of CDs for approximately £7.50 each. Once his costs have been taken into consideration, this leaves a profit of between £5.00 and £6.50 (say £6 to make the maths easier). This gives the manufacturer £12,000 profit on this (big selling) title. Now, if we assume that Tom Waits has been granted a royalty rate of 10% by his record label then, if this release had been officially sanctioned, Waits would have received £1,200 in royalties.

Now, this is some money, and if ten Tom Waits bootlegs were released in a year (though it is extremely unlikely that they would all sell 2,000 copies), then it becomes a not insignificant amount of money. However this is not a figure of major consequence for an established performer: with the income that someone like Waits, Dylan or Young have received for songwriting and official royalties, it may prove to be an insignificant amount. This argument is often repeated by bootleg collectors ('As of July 1993 McCartney's worth was said to be \$636 million. This is the same man opposed to bootlegging because bootlegs take money from his pockets. Right.'³). It is not an especially attractive argument. A stronger case can be made by returning to the argument made by Rotstein that was discussed in chapter 4. Rotstein argued that we should reformulate copyright to be based on 'convention' and 'modulation of convention' rather than idea and expression. He gives the example of the Superman character, arguing that elements of the Superman character have now become conventional and thus should be less protected by copyright. If you recall, to counter criticisms that the creators of such a successful work deserve strong protection, Rotstein argues that

The counterargument to this might be that a text, like Superman, that has become highly conventional will ordinarily have reaped huge financial benefits for the copyright owners. It would thus not be unfair to permit the culture, which has, through mass consumption of the text (for example, through such diverse activities as repeated viewing of the text, word-of-mouth, idolization) adopted aspects of the text as its own, to exploit those conventional aspects.⁴

I now wish to use this argument in favour of bootlegging. The vast majority of bootlegs are of very successful artists.⁵ Through the active process of being a fan, bootleg

³ Belmo's *Beatleg news* October 1993, p.4. Quoted in Schwartz, 1995.

⁴ Rotstein, 1993, p.774.

⁵ In approximate order, the most bootlegged artists are: The Rolling Stones; Bob Dylan; Led Zeppelin; The Beatles; Bruce Springsteen; Prince.

collectors have consumed, engaged with, developed and helped to create the artist-star whose bootlegs they now buy. This will almost invariably have involved a considerable amount of expense. If the public has helped create the star to the point where he is successful enough to create a demand for bootlegs, it would similarly 'not be unfair' to allow them the right to make and buy bootlegs unhindered. And, as with the Superman example, it is likely that the artist being bootlegged will have already reaped significant financial reward for their work.

Before moving away from the economic arguments about royalties, it is worth mentioning that during the protection gap era bootleggers did pay royalties to the artists they bootlegged. Where they could, labels did not collect the royalties that had been accrued for fear of conferring legitimacy on the bootleggers' claims.⁶ During this period, the record industry pushed harder than ever to prevent bootlegging.

I now want to move away from the issue of royalties and challenge the biggest economic argument used by the record companies; the claim that sales of bootlegs diminish official sales. The qualitative discussion of bootleg fans in the previous chapter should show why this argument is fallacious:

...if anybody thinks that if I purchased every single Rolling Stones album in existence, and I have bought all the Rolling Stones albums that have been released in England, France, Japan, Italy and Brazil, that if I have an extra one hundred dollars in my pocket, instead of buying a Rolling Stones bootleg I am going to buy a John Denver album, or a Sinead O'Connor album, they're retarded!⁷

Bootlegs are a specialist commodity bought by individuals with a great interest in their chosen artist. The overwhelming majority of bootleg buyers own all the official releases of their artist(s) before buying bootlegs. Interest in the unofficial recordings of an artist generally only stems from an extensive knowledge of the official canon. A fan is not going to buy a bootleg in preference to a new official release. It is actually bootleg buyers that form the guaranteed market for an artist's new release.⁸ Rather than detract

⁶ There were instances where the labels had no choice but to collect the royalties as they were mixed in with legitimate royalties collected by the SIAE and paid to labels in a lump sum.

⁷ Lou Cohan, a prominent 70s bootlegger, in Heylin, 1994, p.7.

⁸ Pearl Jam manager Kelly Curtis: 'The only argument I've ever heard [against bootlegs] is that bootlegs hurt record sales. I just don't believe that. Anyone who's going to buy a bootleg is going to buy whatever you put out. They're still going to want the studio finished version.' Quoted in Flanagan, 1994, p.38.

from official sales, this group is the most reliable market sector. Many have copies of official albums in triplicate (official releases featuring various minor differences) and will buy new Greatest Hits releases even though they own all the tracks. Responses such as this are common:

I love the band. I buy every official release, even crappy CD singles with dodgy remixes and no proper B-sides, promo items, merchandise, everything.⁹

The attitude and loyalty of these fans also works against the argument that bootlegs may detract from future sales. Schwartz proposes this argument, stating that 'a record company may find that its own plans to someday release performances from the past have been derailed by pre-emptive bootleggers.'¹⁰ However, bootleg collectors will still buy a new archival release, even if they already own the music on bootleg. One collector stated 'if The Stones had released outtakes in 1999 (AS PROMISED!) I'd have bought it even if I already had it.'¹¹ This is a typical response: despite the fact that many Dylan collectors owned the 'Royal Albert Hall' concert from 1966 on multiple bootlegs, they still were the first in line to buy the official version released in 1999.¹² This can be illustrated by the official sales figures of archival releases. Even though most of the material had been around on bootleg for a long time, The Beatles' *Anthology* still sold 8 million copies.¹³

These are the two main economic arguments put by the record industry against bootlegging. One further argument is that if a bootleg is released during a concert tour, then people may be more likely to spend their money on buying a bootleg rather than attending a show.¹⁴ This is a major misunderstanding of what leads people to collect bootlegs in the first place. It is the prioritisation of live performance that leads people to seek out recordings of live performances. For the vast majority of collectors, the live concert is the ultimate place to experience music and, though the bootleg recording can try and reproduce the experience, it cannot replace the experience. The bootleg collector

⁹ 'Bog', email to the author.

¹⁰ Schwartz, 1999. (no page number as it is taken from the internet.)

¹¹ Tony, letter to the author.

¹² This quote is from The Grateful Dead's publicity department: 'Our fans are something different. They're like family. Some of them have tapes of every show, but if the Dead were to release another album, they'd probably feel a moral obligation to buy it.' In Vettel, 1986.

¹³ <http://www.dotmusic.co.uk/artists/spicegirls/news/November1999/news12003.asp> (last visited 9/1/01)

¹⁴ Brown, 1995, p.29.

will not turn down a real concert in favour of a bootleg. A large number of collectors will see more than one show by their artist on any one tour and many will travel overseas to see concerts.

Bootlegging at worst creates negligible economic disadvantage for the major labels and minor disadvantages for the stars that are bootlegged. However, I now want to discuss some of the ways that bootlegging could have a positive economic impact on the mainstream industry. One positive effect is that bootlegging helps maintain a consumer attitude among a demographic group that conventionally buys fewer records. Music is not the dominant consumer force it was in the 60s and 70s and, with many other competing leisure attractions, the declining consumer attitude towards popular music is a problem for the industry. Bootlegging at least maintains one (small) segment of consumers that would probably be lost to the industry otherwise because it keeps collectors in the habit of buying new records. Bootlegs give the fan a product to consume: bootlegs did not appear until 1969 because up to that point acts released three singles and two albums every year and so fans had enough material to satisfy their interest. Now that the average gap between major releases is a couple of years, it is difficult to maintain the same sort of on-going relationship with an artist's work and it is possible that, with no ongoing relationship to the star, consumers would drift away during that time. Bootlegs help to fill that gap.

So one way that bootlegs help the industry is that they help keep people interested in music when they would normally have moved away from record buying. The more significant way that bootlegs are beneficial, however, is the way they work as underground promotion for bands and artists. Later in the chapter I will detail how Springsteen manipulated the bootleg market to remain in the public eye while he was engaged in legal wrangles. Bootlegs also feature as good publicity for other established stars:

A lot of bands see tapes made by fans as free advertising. I know I discovered a lot of bands this way.¹⁵

In Dylan's case the bootleggers are the best PR going. Sony doesn't put any PR into Dylan anyway and I'm sure Dylan's office would be disappointed if

¹⁵ 'Janb', email to the author.

bootlegging stopped because I can't see how else word gets around to sell some of the concerts if it wasn't for the underground.¹⁶

There is a critical kudos attached to being bootlegged. Firstly, being bootlegged almost by definition labels you as a live act, which is important for notions of authenticity as described in chapter 5. Secondly, bootlegging still has an underground cachet to it, it leaves you on the side of the rock'n roll outlaws rather than being attached to the corporate men.¹⁷ Again, this has important repercussions for notions of authenticity. Bootlegs, from many artists' and critics' perspective, are a good thing. As Flanagan states, 'if you ain't bein' bootlegged, you ain't happenin'.'¹⁸

It is not just established bands that gain a critical reputation from bootlegs. Bootlegs can also work as good promotion for up and coming bands whose critical standing can increase if they are taped or bootlegged. There are many tapers who record bands like this, who may not have recording contracts, as one way of documenting a music scene. An historical example of this was the importance of bootlegging to both the New York and, particularly, the English punk movements. Bootlegs were an important aid to Patti Smith's and Television's early careers and, because of the speed with which bands formed and dissolved during these movements, bootlegs were often the only way to hear certain lineups of bands. Many bands, particularly in America's local scenes, get their first exposure through bootleg singles, such as Seattle bands Mudhoney and, more famously, Nirvana.¹⁹

Bootlegs and taping can also serve to create a consumer interest in underground bands, particularly bands that allow the taping of their shows as this can quickly create a community of fans. Even if the fledgling bands do not yet have a recording contract, it should still feed into ticket sales.

I think it helps individual bands because it creates a sense of community that encourages more active interest in the band.²⁰

¹⁶ 'John', interview with the author.

¹⁷ As long as the artist does not complain about them. This is one of the reasons that record companies often have a problem getting artists to stand up in court against bootlegging.

¹⁸ Flanagan, 1994, p.38

¹⁹ Ibid. This goes against the argument made above regarding big selling artists and royalties, but bootlegs can still economically help smaller bands by increasing their profile and helping them to get a recording contract.

²⁰ 'J', email to the author.

I am convinced that both the Grateful Dead and Phish would not have developed the following they have without tape trading.²¹

Through the critical kudos attached to being bootlegged, and the way that this will feed into official record sales and concert ticket sales, the bootleg can actually be a good form of publicity for both established and new artists. Therefore, bootlegs can have a positive economic effect on the legitimate industry. However, whether the overall impact of bootlegging is in the red or the black for the industry, it is a certainly negligible amount. The small scale of bootlegging means that the economics of the bootleg industry hardly dents a record industry that was worth £8.8 billion in the US and £1.8 billion in the UK in 1999.²² This would suggest that, although bootlegging may be a slightly irritating fly to the industry, it should not be economically viable to take any major steps to swat it. However, this is not the case and in the next part of this chapter I shall detail ways in which the record industry has reacted to bootlegging.

Legal responses to bootlegging

The record industry has of course used a wide variety of legal tactics in attempts to prevent bootlegging. I do not intend to go into them in any depth here as they are not significant for our current purposes. What I shall mention here is the general attitude of the record industry to the legal ways of preventing piracy. It is perhaps noting here that the two domestic organisations that co-ordinate the industry's anti-piracy responses, the BPI and RIAA are both private organisations.²³ Despite their often grander claims, they have no obligations except to their members, and they have no public interest remit.²⁴ Both the BPI and the RIAA are funded by their members (record labels) and have to justify their costs to the labels. It is therefore important for them that they are seen to be defeating piracy, and that piracy is shown to be an extremely important, wide scale and dangerous activity.

However, by exaggerating the scale of bootlegging, they make it harder to catch the bootleggers themselves and their attitudes toward their roles has often resulted in

²¹ Kevin, email to the author.

²² IFPI, Recording Industry in Numbers 1999.

²³ There is also an international umbrella organisation that co-ordinates the fight against piracy. This is the International Federation of Phonographic Industries (IFPI). It was established in 1933 and has developed into an effective lobbyist for strengthening copyright. Laing, 1992, p.27.

difficult relationships with the police authorities. One of the reasons for this difficult relationship is that the BPI and RIAA have constantly overstated the extent of bootlegging. The FBI have always been looking for a 'Mr. Big' in bootlegging where one does not exist. A British case involving bootlegger Tim Smith case is a good example: the BPI insisted to the police that Smith was the lead into a Europe-wide organised crime ring, and pushed the police to charge him for both fraud and conspiracy, both much more serious offences than bootlegging. Following negotiation, however, Smith was found guilty of just one copyright infringement and much police time and money was wasted.²⁵ The relationship between the RIAA and FBI was soured during some similar busts in the 1970s.

Anti-bootleg rhetoric

Aside from legal measures, the recording industry has led a continual rhetorical attack on bootlegging. When GWW was released, Columbia was uncertain of the legal moves it could use to put a stop to the bootleg. They did, however, release certain scare stories about the record. Firstly, it began a rumour that the vinyl used to make the record was of a very poor quality and would become unplayable after twenty plays.²⁶ Given that bootlegs were generally pressed using the same pressing plants as the major labels, this was obviously untrue. However, by far the most successful rumour that began at this time, and the stamp that has stuck to bootlegs ever since, was of the terrible sound quality of the recordings.

The popular conception of bootleg recordings is of scratchy LPs of concerts that sound like they were recorded on a building site just outside Wembley Stadium. It has long been one of the staple arguments used by record companies and is regularly reinforced by the media:

Bootlegs have a richly deserved reputation for spotty quality and inferior sound.²⁷

²⁴ The BPI has consistently overstepped its authority when combating piracy, in one case informing UK customs and excise on which imported CDs are illegal. One bootlegger challenged customs asking why they were letting a private company inspect his private property. Heylin, 1994, p.213.

²⁵ Having burned their bridges with the police force, one avenue that the BPI have recently begun to use is getting the Trading Standards Authority to bring cases against bootleggers for them.

²⁶ This rumour was reiterated in *Rolling Stone*. Morthland and Hopkins, 1970, p.745.

²⁷ Vettel, 1986.

The quality of most bootlegs is unbelievably bad.²⁸

While this conception is misleading, it does have some basis in fact. Early bootlegs were often of muffled audience recordings which reflected the portable technological equipment available at the time. Some of these recordings are still available on bootleg today, but in these instances the historical importance of the show outweighs the problems of recording quality. However, there were still many excellent quality recordings available in the 1970s, including many 'soundboard' releases taken from FM broadcasts and excellent quality audience recordings out of certain venues such as the LA Forum. Indeed, the quality cannot have been that bad as many of the record labels' current archival releases, such as *The Beatles at the BBC*, are taken directly from bootleg sources because either the labels no longer have recordings that they originally made, or they never recorded the show in the first place.²⁹

It is true that an audience recording of a live concert is not going to sound the same as a recording made in a hi-tech studio. However, this is not what bootleg collectors want. They want a warts and all document. Bootleg collectors prioritise live performance because studio technology is seen as compromising the honesty of the live performance. For this reason, many collectors prefer a good quality audience recording to a soundboard release. Collectors want a recording of the 'live experience' not a studio tweaked release:

You take an album like the *Dylan and the Dead* album particularly. That's the most striking example, I suppose, of a live performance recorded superbly but coming out sounding like a studio recording. Nobody at the concert heard that – that's not how it came over the speakers. And that's what we want... what a live performance is like. It's tweaked and toyed around with so much afterwards that you lose a feel of what really went down.³⁰

²⁸ U2 management, quoted in Neumann and Simpson, 1997, p.327.

²⁹ 'The Beatles at the BBC – entirely taken from bootlegs. It has to be because the BBC only own 2 master tapes. There are 60 odd Beatles BBC sessions – they don't have any of them. They're long gone so the only sources they've got are the bootleg sources, and virtually everything on the *Beatles at the BBC* is taken direct from an Italian 9CD box set.' Heylin, interview with author. The Italian set that Heylin refers to was *The Complete BBC Sessions*, issued by Great Dane Records. The box set had over 240 tracks on it and came with a 36 page colour booklet containing full track details and explanatory essays.

³⁰ 'John', interview with the author.

An official live album is a soundboard recording with overdubs, but an excellent audience recording has the crowd, the talk and the excitement. Record companies record from the wrong perspective and produce a sterile product.³¹

You don't get emotion like that on an industry album.³²

Even aside from these comments, record industry statements regarding the sound quality of bootlegs become less viable each year. The improvement in recording technology since the 1980s has resulted in the large number of bootlegs released being of an excellent sound quality. Studio outtakes are now perfectly cloned on DAT (digital audio tape), creating recordings the equal of official albums. Many audience recordings now are of a better quality than official studio recordings were in the early 1960s. Television and radio broadcasts still feature as a prime source for bootlegs, and are of an excellent quality. The notion that bootlegs sound bad received short shrift from the collectors interviewed for this study. One stated that 'it simply isn't the case that bootlegs are poor sounding.'³³

One further argument used by the industry against bootlegs is consumer protection. These two quotes illustrate this perspective:

The Consumer may now be deceived into buying a bootleg CD inadvertently. Sometimes, bootlegs are presented with copycat packaging, or misleading descriptions. Often, there is no reference to the fact that the recordings are made from unauthorized concert performances.³⁴

Consumers are the ultimate victims of sound recording piracy. Most illegal recordings are inferior in sound quality, often defective and sometimes are of an artist other than the one represented on the packaging. And as illegal recordings cannot be returned or exchanged, the consumer is stuck with the inferior product.³⁵

³¹ Tony, letter to the author.

³² 'Mister Charlie' a collector quoted in Neumann and Simpson, 1997, p.334.

³³ Tony, letter to the author.

³⁴ Margo Langford (former senior legal advisor for IFPI) in 'Countering bootlegs demands vigilance', Billboard 5/11/94. Available at <http://www.grayzone.com/press2.htm> (visited 26/10/99).

³⁵ RIAA anti piracy press release 1999.

In part, this argument rests upon the inflated sales figures of bootlegs issued by the industry. If they claim a boot is selling 200,000 copies, then the industry can conclude that there are obviously a lot of casual punters who are buying bootlegs. The industry then proclaims that many of these casual buyers are in fact being duped, being sold poor sounding, badly packaged and badly labelled CDs of their favourite artists when in fact what they were expecting was a *bona fide* official release.

During the protection gap era, when recordings could be found in regular retail outlets, there was some credence to this claim. However, bootlegs have traditionally been an underground phenomenon, found in back street record shops and specialist collector fairs.³⁶ Bootlegs are quite difficult to find. One fan said to me ‘bootlegging is an “underground” activity - I went for years totally oblivious to the phenomenon.’³⁷ It is less likely that unwitting consumers will discover bootlegs – with the current legal pressure manufacturers are under, it is difficult enough for experienced collectors to find them. However, should someone who does not appear to know about bootlegs attempt to buy one from a dealer, they tend to be extremely open and informative about their products. There is no attempt to mislead the consumer: the bootleg dealer will ensure that the purchaser understands what kind of product they are buying. Indeed, the after-sales care by bootleggers puts regular retail outlets to shame: the customer can listen to whatever she wants before deciding what to buy and, in many cases, sellers will let a buyer return a bootleg if they find the sound quality is bad, or if it turns out to be a show they already had under another title. This is not mere altruism on the part of the seller – their reputation is important in such a small world and they do not want a disgruntled customer bringing along a police officer next week – but it also stems from the fan mentality of the bootlegger. Sellers will often chat for a long time with buyers about the music, recommending certain shows. They want the buyer to enjoy the music as much as they do themselves.

The bootlegger is painted by the record industry as a shady dealer who does not care for the customer and as an economic mercenary who is not interested in the music. This places him firmly on the commercial side of the Romantic dichotomy. Worse than that, however, they are also described as high level criminals. The record industry is constantly linking bootlegging with organised crime, particularly the more morally dubious such as drugs, arms smuggling and pornography. I have already discounted this link in an earlier chapter: bootleggers are generally fans who got into making bootlegs

³⁶ The FBI busted a ticket only Elvis Presley fan convention in August 1980. The press release stated that ‘gullible collectors’ were paying hundreds of dollars for bootlegs.

because they bought them. However, this is a good example of the attack on bootlegging taking on a particular moral flavour, supporting the arguments made earlier in the thesis.³⁸ However, the best weapon that the record industry can use in turning bootlegging into a moral issue is by turning bootlegging into an aesthetic issue. The majority of record industry attacks on bootlegging centre around the author. Before I move on to these arguments, however, let us look at the viewpoints of the authors themselves regarding bootlegs.

What do artists think of bootlegs?

While at first glance it may seem surprising that artists are not uniformly against bootlegging, given the wide range of personalities under discussion here it should not seem so surprising that there are varying attitudes among artists towards bootlegs. It is worth noting that it is often difficult for artists to come out and state boldly that they are opposed to bootlegging. As bootlegs carry a countercultural kudos, artists risk losing their authenticity by being anti-bootleg as it would seemingly side them with the corporate interests of the industry. Also, it would be stating that their fans should not hear their music, which is a risky strategy. So even artists who do not like bootlegs tend to maintain a discrete silence regarding them. However, bootlegs can also be a source of satisfaction for the artist if they are involved in a difficult relationship with their record company: Prince's ambivalent attitude toward bootlegs reflects his ambivalent relationship with his record company.

Some artists are very supportive of bootlegging, collect bootlegs of their own and others' recordings and have often leaked recordings out that appear on bootlegs. Among this category are Mick Jagger and Keith Richards, John Lennon, Peter Buck and Jimmy Page.³⁹ What is interesting is that these artists all fit into the paradigm of authenticity that was discussed in chapter 5; it should be no surprise that this type of artist appreciates the fans' desire to hear unreleased recordings and that they should feel that their own music fits this paradigm.

³⁷ Tony, letter to the author.

³⁸ Here is one example from Jeff Clark-Meads, BPI director of communications; 'this is not just bleeding the lifeblood of investment from the industry, pirates use money to fund other operations such as drugs and unpleasant pornography.' Quoted in Ellison, 1993.

³⁹ Frontman Lowell George once told Roy Carr that he had been responsible for mixing two Little Feat boots: 'If anyone is going to buy a Little Feat bootleg, then at least I want to make certain the

Long, flat expanses of professionalism bother me. I'd rather have a band that could explode at any time. And I think that's what people like, too; soul and expression and real fire and emotion more than perfection.⁴⁰

These artists appreciate that their record labels cannot put out all of the music that they may want to get heard and they see bootlegs as a way of disseminating music not suitable for a wider audience. REM played a one off acoustic performance in 1987 at McCabe's Guitar Shop in Santa Monica, California. Peter Buck said to a UK fanzine:

It's not something we want to come out as a real record, because that builds expectations. But there's some really neat stuff on it. Because we are successful, any record we put out will be bought by a lot of people, and I don't want to take advantage by putting out something that isn't representative of us... I wouldn't mind doing it through the fan club, doing a cassette, or having a bootlegger put it out, because that's something different.⁴¹

Although the biographical details of these artists handing out and listening to bootlegs is interesting, their understanding of bootlegging is similar to the fans that I have described in the previous chapter. As such, I will not dwell on them here.

Although this may suggest that all artists considered authentic are pro-bootleg, this is not the case. The artist whose authenticity is most revered, and who is the most bootlegged artist of all time, is passionately anti-bootleg:

Bootleg records, those are outrageous. I mean, they have stuff you do in a phone booth. Like, nobody's around. If you're just sitting and strumming in a motel, you don't think anybody's there, you know . . . it's like the phone is tapped . . . and then it appears on a bootleg record. With a cover that's got a picture of you that was taken from underneath your bed and it's got a strip-tease type title and it cost \$30. Amazing. Then you wonder why most artists feel so paranoid.⁴²

quality is good. Anyone who buys a bootleg is going to be a loyal fan who will buy every one of our official albums.' NME 8/9/79, quoted in Heylin, 1994, p.108.

⁴⁰ This quote, from Neil Young, was passed on to me by a collector in an email.

⁴¹ Quoted in Flanagan, 1994, p.46.

Dylan's concern is partly just a financial consideration. Despite his 'authenticity', Dylan has always been extremely commercially minded and he dislikes intensely anyone making money out of his work without him getting any reward.⁴³ This attitude is similar to that of Frank Zappa. Zappa issued a 10 CD box set called *Beat The Boots*. These discs were directly copied from the vinyl bootlegs, including the clicks, with the idea that if someone was going to put this material out, he would be the one to make the money.⁴⁴ However, by far the biggest grievance that artists have against bootlegs is that they diminish authorial control over when a record should be released. In 1994, Elvis Costello recorded a number of 50s rock and roll cover versions, but decided not to release them. They soon appeared on a bootleg called *The Kojak Assortment*. Costello was angry that the decision had been taken from him:

I don't want to have criminals telling me when to release my records. I'll put it out when the right time comes ... Let's face it: the CD revolution is complete now, and everything you've ever wanted is available – so people think that everything that exists should be available. Well, I don't agree; I think there's still a right time for things to come out.⁴⁵

The majority of arguments like this refer to the illicit release of studio outtakes. It is more difficult for an artist to claim the *droit du divulgation* with regard to a live show which has already been presented to the public. As Paul Williams states, 'the performing artist retains no control over his or her performance; as soon as it is brought into existence, it is given away.'⁴⁶ However, there are a few artists who are extremely 'precious' about their live shows:

If I find people bootlegging my stuff, I do my best to confiscate it. I'm very precious about what I release, and certainly very precious about what gets released in a live context. It terrifies me to think that concerts are being bootlegged.⁴⁷

⁴² Bob Dylan, Sleeve notes for *Biograph*.

⁴³ Although it is littered with its own assumptions about authenticity, Goodman, 1998, C5 provides a good example of Dylan's financial acumen.

⁴⁴ See Guy Garcia, 'If you can't beat 'em...music rip off artists go upscale with CDs, but the stars fight back with bootleg albums of their own', *Time* 8 July 1991, p.44.

⁴⁵ Brett Milano, 'Elvis Costello: A Brutal Youth', *CD REVIEW*, Mar. 1994, p.13. Costello officially released the album as *Kojak Variety* in 1995.

⁴⁶ Paul Williams, 1990, *Bob Dylan: Performing Artist* volume 1, Xanadu, London, p.8.

⁴⁷ Nick Cave, in Thompson, 1999, p.38.

Artists that are opposed to bootlegging thus have a mixture of both financial and artistic concerns.⁴⁸ Firstly, there is a financial consideration that they do not like money being made off them without them getting compensation. The second consideration is to do with artistic control. The idea of the Romantic author means that artists believe that they have an inviolable right to determine what is heard by their audience.

One group of artists worth mentioning briefly is the AOR sellers like Phil Collins, Dire Straits and Simply Red. Traditionally, this type of artist has been unbootleggable as they do not match the authentic paradigm. Their concerts are viewed as an attempt to reproduce their albums on stage rather than as the innovative looseness that live performance is supposed to be. They have thus not attracted a bootleg following.⁴⁹ However, during the protection gap era, when it became possible to place unauthorised recordings in supermarkets and corner shops, this opened up a new market for bootleggers and an opportunity opened for 'concert souvenir' recordings for fans of these acts. These artists were often most vociferous about their 'lost' royalties (they had to worry less about losing their authenticity by complaining about bootlegs) and were the acts most willing to assist the record labels in going to court to close the legal loopholes.

One final group of artists are those bands that condone the taping of their shows, such as Metallica, Pearl Jam and the Black Crowes. These bands will allow the taping of their shows and some, most famously The Grateful Dead, have 'tapers' sections' at shows where tapers can plug directly into the feed of the venue to gain a line recording. However, almost without exception, these bands are the most anti-bootleg of any of the artists discussed here. There is a common misunderstanding that The Grateful Dead were in favour of bootlegs. They were actually one of the most active anti-bootleg bands, frequently prosecuting bootleggers, but were pro-taping.⁵⁰

In general, these bands are able to maintain an authentic air about them while being anti-bootleg, because their stance on bootlegs is anti-financial rather than a lost royalties issue. Indeed, The Grateful Dead are probably considered the most authentic

⁴⁸ It should not be assumed that the views of the pro-bootleg artists that I mentioned earlier remain consistent: The Rolling Stones were reportedly extremely angry that twelve hours of outtakes for *Voodoo Lounge* made it out onto bootleg as they were planning to use some of the material for their next album.

⁴⁹ For the same reasons, teen pop sensations rarely get bootlegged. One bootlegger once released a New Kids On The Block bootleg, describing it as '...shit. It was the biggest mistake of my life.' Flanagan, 1994, p.47.

⁵⁰ The following is from the Dead's press office: 'The point is, our audience doesn't bootleg - making that distinction between bootlegging and taping. Bootlegging is illegal, and we bust it when we can. If anybody takes money for anything to do with Grateful Dead music, they're violating the law, they're committing a sin'. Quoted in Flanagan, 1994, p.39.

band in rock history. These bands have also been the most innovative with regard to making many concert recordings available themselves. For example, Pearl Jam recently recorded all 25 shows from their European tour and made them available via the internet.⁵¹ However, these bands do walk a fine line over alienating their fans and losing their authenticity. Metallica suffered a strong backlash from fans after bringing a lawsuit against sharing program Napster. As soon as they start to complain about money, bands lose some of their authenticity. One example regarding bootlegging is the Dave Matthews Band (DMB). DMB allow taping at shows. Their taping policy reinforces the ideas about live performance discussed earlier, stating 'we feel that each show is unique and want to offer our fans the opportunity to recreate the live experience through the audio reproduction of our shows.'⁵² They are, however, anti-bootleg and in April 1997 attorney Jules Zalon, working for DMB, visited forty independent record shops in the Boston area. He carried an injunction that permitted him to remove not only all DMB bootlegs, but *any* bootleg record, in order to 'remove unfair and illegal competition from the shelves. If a customer spends their money on illegal discs by other artists, that is money they don't have to spend on the four Dave Matthews releases.'⁵³ Zalon handed store owners a letter containing demands which included the payment of \$10,000 – potentially fatal for small stores – and a silence clause. The reaction, however, was not silent. The independent stores felt betrayed by DMB as they had supported them when the major record retailers (described in the letter as 'the normal channels of distribution') would not stock an unknown band.⁵⁴ In a reaction to DMB's amnesia, the stores bought advertising space to promote a boycott of all DMB products, and threatened an entire RCA boycott. Stores who were not involved also signed up to the boycott and, following national press exposure, the boycott began to move nationwide. Faced with such negative publicity, DMB had to quickly backtrack. They claimed that they had not seen the letter before it was handed to record stores, and dropped claims for damages, instead issuing cease and desist orders. The band remains anti-bootleg, however. Their bootleg policy on their website encourages fans to inform them of stores that sell bootlegs,⁵⁵ and initially offered incentives such as back stage passes to informants, though these have since been taken down.

⁵¹ <http://www.dotmusic.com/news/June2000/news14154.asp> (last visited 17/10/00)

⁵² <http://www.davematthewsband.com/articles/mediapolicies.asp> (last visited 9/1/01)

⁵³ Zalon, quoted in *Live! Music Review* 5:5, May 1997, p.4.

⁵⁴ This is another example of how the underground culture may help a local unknown band get a following. The local independent retailers are the stores most likely to stock bootlegs and the stores most likely to support local bands.

⁵⁵ <http://www.davematthewsband.com/articles/mediapolicies.asp> (last visited 9/1/01)

The DMB case illustrates the danger facing a band that comes out as anti-bootleg. The one way that it is sometimes possible for an artist to argue against bootlegs is to claim that they are protecting their fans' interests. The best example of this is Bruce Springsteen. Springsteen began his career by being very positive about bootlegging. He aired two ninety minute FM broadcasts from his 1975 tour. Soon after, he was involved in a two year court case with his manager. This effectively barred him from entering a recording studio during this time. He thus performed five entire shows (three hours plus) which were broadcast from the 1978 tour, knowing that these would be bootlegged and thus maintaining an interest for his fans. These shows would only be broadcast on local radio and he was thus reliant on bootlegs to give them national exposure. When beginning *Sandy*, Springsteen dedicated it to all the Jersey girls who would one day hear it through 'the magic of bootlegging'⁵⁶ and when he came on stage at the LA Roxy in July, he shouted 'bootleggers roll your tapes, this is gonna be a hot one.' When asked about bootlegs in 1978 he said

...you find that most of the time that, number one, they're fans. I've had bootleggers write me letters saying, "listen, we're just fans", that's their story. And the kids who buy the bootlegs buy the real records too, so it doesn't really bother me. I think the amount of money made on it isn't very substantial. It's more like a labour of love.⁵⁷

When Springsteen's legal battles were over and he was managed by Jon Landau, his attitude toward bootleggers suddenly changed. In the summer of 1979, just as his new album *Darkness at the Edge of Town* came out, Springsteen and CBS Records launched a civil suit against Vicki Vinyl for two albums of Springsteen's 1978 tour. CBS and Springsteen alleged that the shows had been recorded illegally during the performances. They were both taken from Springsteen's FM broadcasts, however.⁵⁸ Springsteen had suddenly become strongly opposed to bootlegs. In a 1980 interview he stated

⁵⁶ Heylin, 1994, p.136.

⁵⁷ NME 14/10/78, Quoted in Heylin, 1994, p.136.

⁵⁸ At the criminal case brought by the FBI, Vicki pleaded guilty to one case of copyright infringement and was fined \$5000. During the civil suit she was found guilty of 43 copyright infringements. Springsteen was awarded \$50,000 for each infringement, but CBS was only awarded \$1500 of the half a million it had claimed. The damages awarded illustrate the Romantic assumptions that judges have about authorship. The major award is given to the artist not the record company, despite the fact that the company would have suffered greater financial losses than Springsteen. Fortunately for Vicki, CBS had been extremely lax in filing the civil suit, resulting in a three month delay between criminal and civil suits. During this time, she gave away all of her belongings so that Springsteen was unable to collect his damages. For more on the case, see Heylin, 1994, C7.

When I first started out, a lot of bootlegs were made by fans, and there was a lot more of a connection. But there came a point where there were just so many made by people who didn't care what the quality was... The people who were doing it had warehouses full of records that sounded really bad, and were just sitting back getting fat, putting out anything and getting thirty fucking dollars for it.⁵⁹

His anti-bootleg stance is now promulgated as protecting his fans. Another example of this attitude is Steve Severin of Siouxsie and the Banshees, who states 'we object to bootlegs, but not because we want the material to be heard in one way, it's nothing to do with that. It's just that people who have no interest in the band are making a lot of money off people who are.'⁶⁰

The attitudes of artists towards bootlegging are thus quite varied and reflect some of the same Romantic preconceptions about authenticity that permeate bootleg collectors' feelings. Often the artists cannot make too great a statement against bootlegs as it places them on the wrong side of the art-commerce dichotomy. However, many artists do have financial complaints against bootlegs. More artists have concern about their authorial control of their recordings and this reflects the ideas of authorial creativity and genius that place the artist as an untouchable figure at the high altar of art.

Author-centred rhetoric

The record industry uses the figure of the artist in two ways. Firstly, industry proclamations state the financial losses that artists suffer because of bootlegs:

Also, he's [the artist, sic] being cheated financially in very severe terms, because every (bootleg) record that is sold bypasses the artist completely. He receives no royalties, no payment whatsoever. The artist has been deprived of any opportunity to earn an income from his creative efforts.⁶¹

There remains the fact that the music does belong to the artist who created it, and... their right to be financially compensated if it's being sold must be

⁵⁹ 1981 edition of *Creem*, quoted in Heylin, 1994, p.136.

⁶⁰ Quoted in Heylin, p.172.

acknowledged...To release another artist's efforts without authorization and without paying them is more than simply illegal, it's wrong.⁶²

I discussed the financial ramifications of bootlegging earlier, but here I wish to focus on the industry's use of such arguments. With regard to lost royalties for artists, this seems a fragile glass house in which the industry is standing. Major record labels often do not seem particularly keen to pay royalties to their own contracted artists for their official releases. Artists do not start to receive royalties until the costs of recording have been recouped *solely* out of the royalty account (i.e. the label does not contribute to the recording costs) and they often have to accept a lower royalty rate on releases that have been publicised to offset the cost of advertisements. Even after all these deductions, labels still seem reluctant to pay out royalties. In a recent US Senate hearing, founder member of The Byrds, Roger McGuinn, stated that he had made nothing from royalties throughout his career.⁶³ Popular music lawyer Don Engel states 'I would venture to say, except by accident, there isn't an honest royalty statement issued by a major recording company in the business today.'⁶⁴

If the record industry had been concerned about artists losing royalties, then their behaviour during the protection gap era makes little sense. The protection gap occurred because labels could release bootlegs if they paid mechanical royalties to the songwriters. Labels such as Kiss The Stone established a royalty account into which they paid a mechanical royalty rate but these were never collected by the record companies.⁶⁵ So although the record companies claim that they are concerned about lost royalties, they never acted on such concerns when they could. Many current bootleggers desire a return to the situation whereby they are granted some rights to put out the bootleg by paying mechanical royalties.⁶⁶ The record industry was against this, however, for it would have conveyed some legitimacy on bootlegging.

Although the financial implications for the artist are often cited by the record industry, the most significant issue is couched in terms of the author's moral rights. Bootlegging is the exemplar of this because bootlegging removes the author's *droit du divulgation* and can be claimed to affect the artist's *droit a l'integrite*. Although the

⁶¹ Bob Altschuer, representative of CBS records, in Vettel, 1986.

⁶² Pike, 2000.

⁶³ Patti Hartington, 'Byrds man sees promise of digital music', *Boston Globe* 14/7/00, p.D01.

⁶⁴ Quoted in Heylin, 1994, p.383.

⁶⁵ In some instances they had no choice as the bootleggers' royalties were part of a lump sum paid to the record labels by the Italian and German collecting societies. Where they did have a choice, they did not collect.

record industry may refer to the economic factors of the crime, it is the personal crime against the individual artist that is emphasised. When GWW was released, Columbia stated that it was ‘an abuse of the integrity of a great artist...crassly depriving [him] of the opportunity to perfect his performances to the point where he believes in their integrity and validity.’⁶⁷ The creative rights of the artist are the most used argument by record companies against bootlegs. Here are just a few examples:

If you’re making records you should have the right to decide what records go out and what quality they have. If these bastards start putting out stuff you don’t want to put out, then they’re taking away your control.⁶⁸

There are artists out there who are very concerned about bootlegging... They hear their voice not as flattering as it is in the studio, being recorded and released permanently...and it’ll drive them crazy.⁶⁹

The music that you release is the way that you shape your career, you know? It’s a big part of what you say and the way that you say it. It’s an artistic question. I think it’s an aesthetic judgement that should be left to the songwriter. The music is yours. You wrote it.⁷⁰

I do not wish to repeat the arguments that were made in chapter 6, but a brief recap may be worthwhile. The Romantic author is a critical ideological figure for cultural industries because it enables the issue of piracy to become an aesthetic/moral one rather than merely an economic crime. There are a number of reasons for this, but the primary one is that the personalisation of piracy gains public and legislative support while economic arguments may not. Bootlegging is thus portrayed as an aesthetic crime and bootleggers are seen as desecrating the rights of the artist.

I want briefly to counter here the argument that bootlegging infringes an artist’s *droit de l’integrite*, that bootlegs have a detrimental effect upon the artist’s reputation. To a certain extent, this seems common sense: bootlegs are full of bum notes, false

⁶⁶ Heylin, interview with the author.

⁶⁷ Jerry Hopkins, “‘New’ Dylan album bootlegged in LA’ in *Rolling Stone*, 20/9/69, taken from <http://log.on.ca/hotwacks/dylanart.html> (visited 27/12/99). Columbia released the Basement Tape material six years later.

⁶⁸ Nils Stevenson, manager of Sioxie and the Banshees, quoted in Heylin, 1994, p.172.

⁶⁹ Steven D’Onofrio, vice-president of RIAA anti-piracy unit, in Heylin, 1994, p.393.

starts, slurred lyrics, songs the author did not think were good enough for an album. It seems 'only natural' that an artist would not want these publicised. As an RIAA representative wrote, 'what person would not be concerned with the uncontrolled and unauthorized exploitation of their life's work?'⁷¹ One anonymous artist is quoted by the RIAA:

I place a great deal of thought into what material I release commercially and have gone to great lengths to ensure that my legitimate recording agreements stipulate my total control over what is deemed "worthy" of public consumption. As the actions of bootleggers preclude any sort of "artist approval", their actions violate my sensibilities as an artist.⁷²

However, it is not so clear that the artist's reputation is damaged by the release of outtakes and live shows on bootleg. The first reason for this is that bootlegs are not considered part of the official canon, they are not 'authorised'. Therefore, they are not expected to be of the same standard as the 'real' albums. The quote from Peter Buck in the previous section is an example of a band realising that there are different expectations between official and bootleg releases. One collector said:

I think the artist has a right to decide how they present their work, and what work they present to the public. That's their official work. But I don't think that having these extra recordings changes that. I think the official recordings can stand on their own and you can regard them as the artist's real work, as what they're presenting, and the unofficial work as just that, unofficial and not part of their canon.⁷³

A similar argument can be made about the audience for these recordings. Bootlegs are not heard by the general public. Rather they are heard by those committed fans who have already made their minds up about the artist's reputation, and have helped to support it and spread the word. Having a few thousand committed fans hear an aborted version of a song is not going to damage an artist's reputation. And if an artist is concerned that a

⁷⁰ Springsteen, after winning a case against a bootlegger in 1999. Available at http://www.bootcamp.springsteen.com/fr_bnews.shtml (visited 178/8/99).

⁷¹ Donald J. Valdez, Vice-President, Anti-Piracy, Legislative Regional Anti-Piracy Counsel, letter to *Live! Music Review* 4:12, December 1996, p.2.

⁷² In *ibid.*

⁷³ Logan, email to the author.

recording of live concert is going to damage his artistic reputation, then perhaps he should not be charging so much for tickets to the show.

Bootlegs can actually help enforce an artist's reputation. Although he has drawn criticism for his editorial decisions, Dylan's reputation was surely enhanced by fans hearing the songs that were left off *Infidels*. And it is hearing the bum notes and false starts that actually serve to authenticate the artist. They make the artist human, they show a real person before the human glitches are airbrushed out through technological trickery. It is the mistakes that fans are interested in because that's what makes that show or song different, compared to the mass produced, perfect album. Thus although artists may complain about being heard playing badly, it can reinforce the notions of authenticity that lead the fans to admire the artist in the first place. So although the industry and artists do complain that bootlegs damage an artist's reputation, this is not unambiguous. By showing the artist to be human and thus individual, bootlegs can serve to authenticate the artist, thus improving her reputation.

Official releases

Aside from attacking the bootleg industry both legally and rhetorically, the legitimate industry has tried one other way of defeating bootlegging: it has tried to subvert it. The record industry has over the last fifteen years released a wide range of records that seem to compete with bootlegs. However, because of the market situation they are in, the major record labels will never be able to successfully compete with bootleg releases. It is also debatable whether they have ever fully understood the mentality of the bootleg collector. In this section I will discuss some of the ways that the industry has responded to bootlegs by trying to compete with them and discuss why the record labels cannot successfully compete.

The first moves against bootlegging came by rush releasing live recordings as direct competition to bootlegs. London Records rush released *Get Your Ya-Yas Out* to have something on the shelf to compete with *LiveR Than You'll Ever Be*. The official album was available within a month of the recording being made. Lennon's 1969 album, *Live Peace in Toronto* was released solely to suppress bootleg recordings (it did not succeed).⁷⁴ Dylan and the Band's 1974 live album, *Before the Flood*, (so called because it was before the flood of bootlegs of the tour) managed to get released before any bootleg had come out.

⁷⁴ Thompson, 1999, p.34.

By the mid 1970s, labels were trying to use live recordings as a way of promoting their roster, particularly new acts. Despite the oxymoronic title, the labels promoted the 'official bootleg'. These 'promotional use only' recordings of live shows were delivered to radio stations and were not for sale. One example of this was a recording made of an Elvis Costello show at the El Mocambo club in Toronto.⁷⁵ These 'official bootlegs' were an attempt to gain the underground status attached to bootlegging. This tactic has been explicitly used artists such as Aerosmith (*Live Bootleg* in 1978), Paul McCartney (*Unplugged: The Official Bootleg* in 1991) and Rick Wakeman (*Official Live Bootleg* in 1999).⁷⁶

It was in the 1980s, however, that the archival release really began to develop. Since the late 1970s, sales of chart hits had diminished and the record industry has become increasingly dependent upon its back catalogue to maintain its profitability. The success of the CD has proved a lifebelt for the industry as record buyers have replaced their vinyl collections. The industry was initially pessimistic about the possibilities of CD, however. Only one of the majors (Polygram, who were owned by Phillips who designed the CD) backed the CD revolution from the start. Once the CD was introduced, the labels needed some way of persuading consumers to buy them. Obviously the digital quality sound was enticing but they felt that those customers most interested in sound quality would already have substantial vinyl collections and would be reluctant to replace them. The addition of bonus tracks to the CDs was one way of enticing consumers.

The CD and the archival release also heralded a new phenomenon in the industry: the box set. Once again, it is Dylan's work that features at the forefront of the new move. Columbia records had discussed the possibility of a Dylan retrospective box set in 1983 but the project had suffered a number of delays. In 1985, however, they released *Biograph*, a deluxe set which offered 53 tracks, including 17 that had never before been released. Despite being expensive (£55 for a three CD set), *Biograph* proved to be a success. It had the attraction of a more extensive greatest hits selection with the bonus of the unreleased tracks to encourage collectors to buy the set.⁷⁷ This was

⁷⁵ Unsurprisingly, these records invariably found their way onto actual bootleg releases.

⁷⁶ A search for 'bootleg' on www.amazon.com on 9/1/01 revealed 54 albums containing the word 'bootleg'.

⁷⁷ Despite its success, *Biograph* was still upstaged by a bootleg. During 1985, a ten album bootleg box set called *Ten of Swords* was issued focusing on Dylan's 61-66 work. This was compared favourably to *Biograph* by many commentators including Cameron Crowe who had written the booklet for the official release). Rolling Stone ran an article praising *Ten of Swords*, causing a very public spat between CBS and the magazine. See Michael Goldberg, 'Bootleg Bob: Dylan set creates a stir; CBS

followed in 1986 by a Bruce Springsteen box set, *Live 75-85*, which brought together live recordings that had initially appeared on various bootlegs.

The box set was taken to a new level in 1991, again by a Dylan release. Columbia released *The Bootleg Series vols. 1-3*, a three CD box set featuring 58 previously unreleased Dylan tracks. Again, this has set a precedent and there have been a number of similar releases in the last ten years.⁷⁸ These have not only been limited to box sets, but many newly packaged single CD reissues, such as those by The Byrds, The Band and Elvis Costello. 'Complete' seems to be the new buzzword in popular music – fans want a complete account of the recording sessions. It seems that the record industry is beginning to understand the collector mentality and compete with bootlegs. This is certainly the view of writers such as Blunt who argues that record companies releasing outtakes 'gives fans the missing performances they've been longing for, and is significantly effective in cutting the bootlegger out of the picture.'⁷⁹ However, writers like Blunt write pieces on record piracy without understanding the mentality that drives bootleg collectors.⁸⁰ Perhaps the archival releases do not serve collectors as well as the industry and its apologists make out. *The Bootleg Series* certainly contained some great discoveries for Dylan collectors: previously circulating outtakes in superb quality, about twenty tracks that collectors did not know existed, and one track that had always been assumed not to exist! It does, however, contain a number of flaws and omissions which left many collectors feeling unsatisfied:

When they put that together, he [compiler Jeff Rosen] made a fundamental error, which is... the first thing to look at if you're going to put *The Bootleg Series* together is look at the recordings. First recordings you look at – this applies to any artist – is look at the ones that nearly made it. By that, I mean look at the ones that made it to test pressing, alternate sequences, final sequences of albums that didn't come out. So you go to *New Morning* – there's 2 alternate sequences. They've got the *Tomorrow is a Long Time*, which is a major outtake. They've got the *If Not For You*, which they did use on *The Bootleg Series*, the George Harrison one. They've got the *Sign on the*

not amused', *Rolling Stone* 10/4/86, p.13. and Richard Harrington, 'CBS records takes on Rolling Stone: Ads pulled; magazine to limit coverage', *The Washington Post* 15/4/86 at C1.

⁷⁸ For example: Genesis, *Archive 1967-1975*; David Bowie, *Bowie at the Beeb*; John Lennon. *Anthology*; Jimi Hendrix, *Experience Hendrix*; Little Feat, *Hotcakes and Outtakes*.

⁷⁹ Blunt, 1999, p.201.

⁸⁰ They also seem to rely entirely upon record industry statistics regarding bootlegs which poses serious problems for the validity of their conclusions.

Window with the orchestra. I'm not saying those are great, but those are recordings which nearly made it. The *Blood on the Tracks* test pressing songs nearly made it. That was an album that existed. The *Down in the Groove* outtake of *Got Love If You Want It* nearly made it. So if you're going to put something like that together, the first you should be looking at is 'okay, which songs nearly made it'. Rosen didn't do that. The decisions that he made about the material were based on personal preference; 'I like this period therefore it's well represented. I don't like this period therefore it's badly represented'. You can't do that. You've got to understand that Dylan's career has a sweep. It's important. There should have been at least one outtake from the *Self Portrait* sessions with the original backing tracks, which were wiped. There's 14 bloody outtakes to that album! You can take one of them surely and put it up on a multitrack and mix it down. Just so people can get a sense of what those sessions sounded like and if you're putting out an archival release that's what you need to do. He's thinking 'there won't be anything good'... [but] what you should be trying to do, I believe, is explain the process. How did these things not happen? What was it about these songs that it's not quite there? What was Dylan trying to do with his albums, that meant that these songs didn't fit? *Moonshiner* is on *The Bootleg Series* and is an absolute fucking masterpiece, but you can see why that isn't gonna go on [*The*] *Times* [*They Are A-Changin'*]- it's a cover, it's a traditional song, he was beyond that he didn't want to do that. But you've got to give a sense of why these things didn't make it.⁸¹

Heylin's comments once again highlight the understanding of collectors that recordings must 'explain the process.' *The Bootleg Series* lacks a sense of purpose. In essence, it is just a collection of Dylan outtakes, some good, some indifferent. *The Bootleg Series* was a great revelation for casual fans who had not heard these songs before. As an attempt to subvert the bootleg market, however, it is a failure.

Why is this? The first possibility is that the record industry has just failed to understand the mentality of bootlegging. While this is partly true, it cannot be the only explanation. There are many individuals working in the music industry who share an interest in bootlegging (where else do the majority of the tapes come from? If everyone

⁸¹ Heylin, interview with the author. See also Heylin, 1991, 'Bob Dylan: The Bootleg Series volumes 1-3', *Record Collector* 140, pp.84-89.

in the industry was anti-bootleg, it would be possible to stop the apparently endless flow of studio recordings leaking out of the industry), some of them quite high up the corporate ladder. These people at least should have some idea about why bootlegging occurs. The ideas that permeate bootlegging are often shared by those in the industry. Corporate misunderstanding can only be a partial explanation.

The reasons that the record industry cannot satisfactorily compete with bootlegging are structural rather than idealist. There are two primary reasons that the industry is hamstrung in this way. The first is that the major labels are selling to a much wider market than bootleggers. This leads to a certain amount of 'watering down' archival releases:

And I don't blame Rosen for the fact that it was cut down from its original 4 CDs, because the original 4CD version made a lot more sense. But the record company's logic was 'we can put a 3CD set out for \$40, and we can put a 4CD set out at \$55, and our marketing people say that one will sell 50% more copies than the other, so the fact that it makes no sense, and the fact that it's an insult to the man's career is not the issue: we're putting it out as a 3CD set.' Hence bootleggers, because no bootlegger would cut it from 4 to 3.⁸²

Heylin is correct when he says that a bootlegger would not have cut the fourth disc.⁸³ This illustrates one reason that the record industry cannot compete with bootlegging: the culture industry argument. In the mainstream industry, the profit motive has taken priority over an aesthetic judgement. The fourth disc was dropped because of financial reasons not because of the artistic worth of the set. The economic consideration takes priority over the aesthetic consideration in the mainstream industry.⁸⁴

This argument does not depend on bootleggers being entirely altruistic and driven by an artistic calling. That bootleggers would not have cut the fourth disc is also a reflection of the different market that the bootleggers target, because no Dylan collector would have been deterred by paying for a four disc set rather than a three disc one. CBS' marketing department was probably accurate when it stated that there would be a

⁸² Heylin, interview with the author.

⁸³ Bootleggers actually responded to *The Bootleg Series* with their own *Genuine Bootleg Series*. This has now grown to nine discs.

⁸⁴ For example, Prince, arguably the biggest artist in the world at the time, offered his label a triple album set *Sign O' the Times* to release in 1985. The label refused, stating that he must reduce it to a two album set or it would not sell.

significant drop off in sales if the box set contained a fourth disc. The fact that both manufacturers could portray accurate pictures of their target audience and draw different conclusions demonstrates why the record industry cannot compete with bootlegs. The fans who buy bootlegs are both more knowledgeable and more interested in their artists than the average consumer. They are less conscious of the cost of sets and more willing to buy exhaustive releases. They are also interested in different things than regular consumers: historically interesting shows for the collectors will rarely coincide with the popular taste.⁸⁵

This creates a problem for the industry, however. Generally, the bands that have been most bootlegged, such as Springsteen and The Beatles, have a large crossover appeal.⁸⁶ Their albums are bought by both the hardcore collector and the casual fan. In those instances, it would be hard for official labels to release a specifically fan targeted box set:

I would get worried if they started putting out some of the material that bootleg collectors are interested in, and perhaps the person in WH Smith isn't expecting that kind of stuff, doesn't really want to listen to a take of *Shot of Love* because it's got an extra verse in. If [fans are] being sensible about it – we sit there and argue that *The Bootleg Series* wasn't put together properly because it didn't have this, it didn't have that – they weren't selling it to us. They have got to look at the market that they're selling to. I think it's wrong if they put out a three album set when one album is outtakes and two are effectively greatest hits, that annoys me. That's a disservice to both sets of fans.⁸⁷

The development that this bootlegger refers to has recently become very popular in the industry and is an example of the bootleg 'terminology' infiltrating the mainstream market. The trend is to include on a Greatest Hits package one or two 'rare and unreleased' recordings, such as a live performance or an alternative take of a song.

⁸⁵ For instance, The Stones played a show in Miami in December 1969. Their plane was delayed by four hours and they started the show very late. It was so cold that the guitars went out of tune as soon as they began playing. Between each song they retuned the instruments, only for the same thing to happen again. This fascinating document will never see official release, both because it is not appealing to the mainstream audience and because the musicians themselves would not want to be portrayed in such an untuneful manner.

⁸⁶ This is not necessarily the regular occurrence. Many of the most popular artists, such as Simply Red or Cher do not interest bootleg collectors for reasons of authenticity.

⁸⁷ 'John', interview with the author.

Although the fan will have all the artist's greatest hits, the lure of these one or two tracks coerces the collector into buying a redundant release. Archival releases have developed as a way of exploiting the most loyal fan base. It is also a disservice to the casual buyer who wants the familiar versions of the greatest hits rather than an obscure version of the song.

The other major reason that the major labels cannot compete with bootlegs is that bootleggers do not have to be nice to the artist involved. Generally, the record label is bound to keep the artist sweet.⁸⁸ Here are two examples of people working on box sets for official labels where the artist has proved an obstacle to release:

I do a lot of reissue work for the music industry and I constantly run up against artists... Lou Reed was incredible when I did a box set on him. The most minor flaw to his ears on anything meant this would just be a heinous crime if the public ever heard this and he went so far as to offer his record company a lower royalty rate if they would not put some outtakes out that they had the right to put out.⁸⁹

I did a Tom Verlaine double CD. It was done totally without Verlaine's co-operation. Not because... I mean I knew Verlaine, I said to him 'look we're doing this, this is what I want to do. The record company have already said we're going to do it anyway whether Tom likes it or not and we've got the contracts that say we can.' Now in that situation he had a choice – co-operate and have the thing come out as he wanted it to, or just say 'you can't do that' and whinge about it. He couldn't stop it happening. So he whinged about it... look at the Richard Thompson box set. It's diabolical. Why? Because it had the total input of Richard Thompson.⁹⁰

One of the main reasons that record labels are not able to compete with bootlegs is that the bootleggers bypass the censorial rights of the author. It does not matter if Nick Cave is precious about what gets recorded if someone else is doing the recording. The bootlegger removes any traces of artistic egoism by catering to the desires of a small section of the public. Lenny Kaye, of the Patti Smith Group states 'I think that bootlegs

⁸⁸ Although in the majority of cases, the record label will have the final say over whether archival releases get attached to a CD reissue. This casts a small shadow over their claims to respect the artistic integrity of their acts, and can often destroy the aesthetic unity of the original album.

⁸⁹ Rob Bowman, interview with the author.

keep the flame of the music alive by keeping it out not only of the industry's conception of the artist, but also the artist's conception of the artist.'⁹¹ The other problem for the record labels is that they usually know a lot less about the output of their star (including what is lying in their own vaults) than fans. Some labels have managed to bypass this issue by getting fans to produce their archival releases. Heylin argues that these have proved to be the most successful reissues: 'the artists that have given the fans control of their back catalogue – Jethro Tull, Deep Purple – mostly prog rock bands interestingly enough, have reaped great rewards from that stuff because fans put out what fans want.'⁹² However, it should be pointed out that the bands such as these have quite a specialist market position and do not have the crossover appeal of a band like The Beatles. It is therefore slightly easier for them to give their fans control of their archives.

In the last ten years or so, the record industry has begun to issue archival releases of established acts. However, while these often prove a bonus to bootleg collectors, they can in no way compete with bootlegs. This is for a number of reasons: firstly, record labels would be unable to put out the quantity of recorded shows that collectors desire; secondly, major record labels' market considerations must encompass a much wider constituency than bootleg collectors and the tastes of the two markets rarely coincide; thirdly, record labels are in regular contact with the artist and thus are often influenced by the censorial wishes of the artist while bootleggers do not suffer from this problem. These releases are motivated by a need to make CD reissues more attractive to collectors who already own the album on CD rather than as any serious attempt to understand the bootleg mentality. Thus, while industry apologists claim that the industry now supplies fans with the archival releases they desire, they are an attempt to manipulate, rather than cater for, the mentality of bootleg collectors. As Neumann and Simpson state, 'the corporate "bootleg" package is merely a contradiction in terms.'⁹³

This chapter has looked at the various ways that the legitimate record industry has tried to stamp out or circumvent the problem of bootlegging. The industry spends a large amount of money each year, and uses up a significant amount of police time in its efforts to stop bootlegging. Yet the chapter has also discussed the economic impact of

⁹⁰ Clinton Heylin, interview with the author.

⁹¹ Quoted in Heylin, 1994, p.392.

⁹² Interview with the author. Jimmy Page has gone further, repeatedly stating that there was no need for an official Led Zeppelin live anthology because it had already been done on bootleg for those that really cared. Flanagan, 1994, p.46.

⁹³ Neumann and Simpson, 1997, p.339.

bootlegging, arguing that bootlegs cause minimal economic harm to the industry and may even have a positive effect. This leaves a puzzle: why does the industry expend so much effort over an economically insignificant phenomenon?

Chapter 10

Bootlegging and contested commodities

In this last chapter, I want to attempt to answer the question posed in the introduction to this case study: why is the record industry so bothered about bootlegging when it is of minimal economic consequence? Bootlegging, as has already been detailed, is a small scale phenomenon. Even during a peak protection gap year like 1993, the street value of bootlegs amounted to just 0.38% of worldwide record sales.¹ Yet, aside from specific periods of moral panics, such as those over home taping or MP3, bootlegs have always been the number one folk devil of the record industry and have traditionally garnered more headlines than either counterfeits or pirates, despite these other types of illegal recordings being more economically damaging.² Although there has been a recent reversal due to CDR piracy, seizures of bootleg CDs have regularly been greater than counterfeits, despite counterfeiting being a much more widespread phenomenon.

There does not seem to be any economic logic behind the record industry's excessive attempts to kill off bootlegging. The costs of campaigning against bootlegs surely far outweigh any potential economic benefits. We must therefore look beyond economic reasoning for an answer to the question. Instead, we must see the record industry's response to bootlegging as the result of its symbolic importance.

The symbolic significance of bootlegging

My argument is that bootlegging is an important symbolic crime because it challenges two things. Firstly, it challenges the commodification of popular music. This is an explicit challenge and I will discuss this in the next section. Secondly, and more significantly, bootlegging is an apparent challenge to the model of Romantic authorship that forms the keystone of copyright. Bootlegs are the exemplar of the *unauthorised* release. The bootlegger knocks the crown from the Romantic author's head and relieves him of his rights. In particular, the bootlegger takes away the author's censorial right of

¹ Worldwide record sales in 1993 were \$31,201,700,000 (IFPI, The recording industry in numbers 1999, p.159.) Estimated value of all bootlegs produced in 1993 was \$120,000,000 (Flanagan, 1994, p.46.) Overall piracy losses in 1993 were reported by the IFPI as \$1.9 billion, although this figure is somewhat arbitrary.

² Heylin, 1994, p.230. In a sample of all the newspaper reports I have found on piracy during the course of this research (excluding the current moral panic on MP3), just over 50% were related to

deciding when and whether to release a work to the public, challenging the author's natural right to unpublished works that was asserted in both the *Donaldson* and *Wheaton* cases. The record industry is thus concerned about bootlegging because it challenges the ideas of authorship upon which the industry rests. In this understanding, if the record labels turn a blind eye to bootlegging then the whole edifice of copyright will come crashing down around them. They would get burned while the bootleggers fiddled.

Bootlegging is in some ways an affirmation of ideas discussed in chapter 4 regarding a positive public right in copyright. The amount of time and effort put in by those interested in bootlegs results in a constant production and reproduction of meaning by the fan, both in relation to the music work and the artist-star. Bootleg fans do not accept the role of the passive consumer that the record industry would like us all to adopt. Parales states that 'the companies...want passive consumers who'll buy what's marketed, not smartalecks who'll search out alternatives.'³ Instead, bootleg collectors take control of the work, and this reflects the input their active participation in the creation of the meaning of the work. While this explicitly occurs within the concert experience, Cavicchi explains how this creation of meaning is an everyday occurrence for fans, pointing out that while ordinary audience members are only in this mode of meaning-creation during a concert, fans stay 'in frame' every day. Fandom is a permanent state of meaning-creation.⁴ These fans are involved in the production of the work that in Romantic understandings comes as solid, given, finite. Though this happens regularly through the day to day activities of being a fan, it most explicitly occurs during the concert. Arguably the biggest influence on a live performance is the relationship between audience and performer. They feed off each other's presence. Furthermore, the audience is aware of its participation in creation at this point (why else go to a concert?). Being an audience member is not a passive user experience. The concert

...is not something to watch passively from comfortable seats separated from the stage, but something to actively join, and fans are constantly creating their own performing traditions. Such traditions are usually based on themes in songs and aim to break the invisible wall that divides performer from audience.⁵

bootlegging rather than other forms of piracy. This is extremely disproportionate to the scale of bootlegging *vis a vis* counterfeiting and piracy.

³ Jon Parales, *The Penguin Book of Rock & Roll Writing*, p.512, quoted in Heylin, 1994, p.384.

⁴ 1998, p.91.

⁵ *Ibid.*, p.93.

Fans and artist join together as creators. This a relationship of equals much closer to that 'economics of compensation' conceptualised by Wordsworth in 1802 rather than the distorted, hierarchical, teacher/pupil relationship that would later come to be understood as Romanticism.

However, I do not wish to dwell on the ways that these fans create meaning here. Cavicchi has offered a detailed description of how Springsteen fans do this, and Neumann and Simpson refer to the meaning created by tapers. I have offered a few examples in chapter 4. Such descriptions implicitly adhere to the understanding that popular culture is created by the people. According to Neumann and Simpson,

...bootleg recording producers and collectors are often labeled as deviant because they resist and call into question rules, conventions and definitions of popular music production and consumption. Instead, bootleg recording often underscores (and to some extent, critically amplifies) the *popular* dimensions and meanings of popular music.⁶

I shall discuss this in the next section.

If we accept this idea – that bootlegging is a reflection of the public's role in the creation of the work – then what implications does this have for copyright? It is possible that a vigorous notion of the public domain that I suggested in chapter 4 could reflect the public's role in creation and be utilised in the area of bootlegging?⁷ Firstly, the performance at a live concert could enter the public domain as it is given. This would enable it to be free to be recorded by anyone who wishes, either for profit or not for profit. While it could be argued that the bootlegger is making money off the artist without compensating them, it can be argued that: a) because tapes should be more freely available, there would be less of a market for commercial bootlegs of the shows;⁸ or, b) the artist has already received compensation for the performance through ticket revenue. For those who question whether this would infringe an artist's rights of integrity of divulgation, it can be argued that: a) the performance can be regarded as publication so the artist has already chosen to release his work; and b) it would be hoped that a show for which an audience has paid approximately £20 each would be of a sufficiently good quality to be a positive reflection on the artist's reputation.

⁶ Neumann and Simpson, 1997, p.321. Emphasis in original.

⁷ To some extent it is being used, but not recognised in copyright doctrine. This is why bootlegging has such symbolic importance.

The right to bootleg studio outtakes would require some alternative conceptualisations but, if suggestions from chapter 4 were followed, and if all copyrighted works had to be deposited for public availability (even if they are not released by a record label) then bootleggers could acquire outtakes from copyright offices to put out on bootleg. To ensure adequate compensation, this would probably have to involve some kind of mechanical royalty payment. For those who argue that this may damage the artist's reputation, it is possible to argue, as I did in chapter 9, that these recordings do not damage an author's integrity because they are not in competition with her chosen released work and are thus not under the same expectations as the official canon. Indeed, having outtakes available can sometimes strengthen the artist's reputation.

These suggestions are, of course, utopian pipe dreams and not the purpose of this thesis. Even if there was the necessary sea change in copyright to accommodate these ideas, they may not be practicable: they may lead to artists destroying all outtakes so they do not get heard;⁹ or they may result in record companies only signing major artists, or utilising contracts even more unfavourable to the artist. They would almost certainly have negative consequences for bootlegging, similar to the possible future of bootlegging in the wake of CDR. However, the features of bootlegging *do get you thinking that way*. Bootlegs call into question just what rights the public should have in copyrighted but unavailable material. Ressler stated that bootlegs 'are alternative recordings, and they aren't in competition with the stuff that's out. That doesn't make it legal, but it does raise questions about the rights of the collector.'¹⁰

This is why the record labels are so concerned about bootlegging. Bootlegs open up issues about the rights of collectors, of how popular culture could be organised by the people, that could tip the balance back towards the public right in copyright. And it achieves all of this by challenging the basic assumptions of Romantic authorship upon which copyright practices are based. I must stress that this is no way a *conscious* worry – it is often not even a conscious challenge. The idea of the Romantic author is so embedded in modern culture that it would be impossible for record company executives to think in any terms other than bootlegging being an infringement of authors' rights. But the symbolic significance of bootlegging is that it challenges the Romantic author.

⁸ Peter Mensch, part of Metallica's management team, stated that a bootlegger told him that allowing tapers to record shows destroyed the market for Metallica bootlegs. Flanagan, 1994, p.38.

⁹ Both William Blake and Franz Kafka ordered friends to destroy all their work when they died. In both cases, the friends fortunately kept the work for posterity.

¹⁰ Jeffrey Ressler, (1991), 'Bootlegs go high-tech', *Rolling Stone* 614, 30 May, pp.15-16. Quoted in Neumann and Simpson, 1997, p.327.

Furthermore, because of the notions of individuality that are bound up in our conception of the Romantic author, bootlegging is understood as a greater crime than ordinary piracy. Ordinary piracy is an economic crime whereas, recalling the paternal relationship between author and work that was discussed in chapter 2, bootlegging is the artistic equivalent of kidnapping. It is the ultimate form of plagiarism (the crime of stealing a human being). Bootlegging is conceptualised as a moral crime.¹¹

Contested commodification

Bootlegging also offers a much more explicit challenge against the commodification of popular music. As Neumann and Simpson state, bootlegging is the arena where ‘people locate their experiences and their selves *against* the commodification of popular music.’¹² I have already discussed how Romanticism ‘works’ in publishing industries as a way of submerging the process of commodification, and discussed some of the reasons why such a submergence is necessary. In this section, I want to return to Radin’s analysis of why the process of commodification becomes contested.

Some objects and social relations are seen as being outside of the market realm. What these particular objects are changes over time; Frow gives the example of the introduction of life assurance policies in the nineteenth century being extremely contentious as they were seen as a form of gambling on life and death.¹³ He concludes that ‘what seems to be almost universal, however, is the distinction between those goods that may be freely circulated and those whose circulation is restricted.’¹⁴

Radin, in her book Contested Commodities, offers an explanation of why certain objects and relations are seen as beyond commodification.¹⁵ Radin argues that those objects which are seen as being inappropriate for commodification (objects which she calls ‘market inalienable’) are viewed in ‘market rhetoric’ as examples of market failure, but this approach is incorrect.¹⁶ ‘in order to understand market-inalienability as

¹¹ Martin Taylor claims that all bootlegs are ‘immorally produced’ and states that ‘the industry holds the copying of a sound recording by a private individual to be immoral in all cases.’ (1993, pp.257-258)

¹² 1997, p.323, my emphasis.

¹³ Frow, 1997, pp.174-175.

¹⁴ Ibid., p.127.

¹⁵ Radin, 1996. This book developed out of earlier articles; see Radin 1982, 1987, 1991 and 1995.

¹⁶ By ‘market rhetoric’, Radin is referring to the writings of neo-liberal theorists such as Richard Posner and Gary Becker who analyse social relations (such as sexual relations and marriage) in economic terms (such as a cost/benefit analysis of rape). Radin calls this metaphorical

something other and more than a second best response, we must escape from the discourse of commodification and its reliance on market failure as the explanation for any and all deviations from *laissez-faire*.¹⁷ To achieve this, argues Radin, we need a contextualised understanding of personhood. Traditional liberalism has a 'thin' understanding of personal freedom – the freedom to own and alienate property – which, she argues, opens up the possibility of universal commodification. Radin's idea of a broader understanding of personhood includes understanding the importance of property to the development of personhood. There are echoes of Hegel here; the will must impose itself upon external objects to be substantiated and thus property is that which contains the subject's will. It is along these lines that Radin offers her major differentiation – between fungible property and personal property.

Fungible property, for Radin, is that which can be alienated by the individual without damaging the personhood of the owner. Fungible property is that which can be unproblematically alienated such as a newspaper, or a hundred thousand footballs owned by a capitalist. Fungibility is associated with alienability and commensurability (I can make a cost/benefit analysis of whether I should spend my money on a kettle or a new pair of shoes, or whether to save it or spend it on getting drunk). Personal property, by contrast, emanates from Radin's 'thick' conception of the person. It is those objects and personal attributes that cannot be alienated from the individual without doing violence to their personhood. This can be an object such as a wedding ring, or a family heirloom. A significant piece of personal property would be one's house. However, due to her thick conception of the person, Radin includes in this category not just objects as personal property, but also personal attributes such as sexuality, political commitments or moral beliefs. Personal property is associated with inalienability and incommensurability (I cannot make a cost/benefit analysis of my moral commitments. Indeed, to even think about my moral commitments in this way offends my moral sensibilities).

Radin states that this conception of personal property can be defined commonsensically, a problematic statement that will be discussed below. However, it is those objects that are seen as personal property which are seen as market inalienable. These objects can be defined both individually (my grandmother's watch is market inalienable) or socially (everyone's votes are market inalienable). She argues that either the literal or metaphorical commodification of personal property is harmful to our personhood. Radin

commodification 'market rhetoric' which she criticises. She argues that the public are concerned by market rhetoric because they believe it will lead to actual commodification.

¹⁷ 1996, p.28.

then goes on to give some examples of these ‘contested commodities’ – prostitution, baby selling/surrogacy and selling kidneys.

Despite weaknesses in Radin’s thesis (discussed below), it is extremely useful for highlighting that despite the logic of capital to commodify everything, commodification is actually an uneven process. In the words of Frow, ‘every extension of the commodity form has been met with resistance and often with reversals.’¹⁸ The work of Frow (1997) and Gaines (1991) offers a more sophisticated way of taking forward the point that commodification is uneven and contested. Frow’s essay highlights that commodities are constantly endowed with what he describes as ‘non-commodity meanings.’ Leaning on Kopytoff’s anthropological model, he argues that ‘objects therefore move, under the appropriate circumstances, in and out of the commodity state (that is, between use value and exchange value).’ I am not sure whether Frow’s divorce of use value and exchange value is correct here (a commodity can only be a combination of use value and exchange value), but what he is suggesting is that people regularly understand or appreciate their property (which is almost invariably a commodity) in terms other than that of its exchange value. As far as I understand it, this does not mean that the object has ceased to be a commodity, for a commodity must entail a use value so that people want to buy it, but the meaning of the object is understood in terms of its use value. If we accept that commodities are valued by owners in terms other than that of exchange value, then we can utilise Radin’s continuum of fungible and personal property as a way of characterising this valuation: the more an object is valued for its specific use value, the more likely it is that it will be personal property. (Perhaps we could add here that the more an object is valued for a use value other than the one defined in its production (i.e. what the commodity is sold to do), the more likely it is that it will be considered personal property). The wedding ring, for example, will be valued wholly in terms of its use value (as a symbol of marriage rather than as a piece of jewellery) and thus not conceived of in exchange value terms at all.¹⁹ Crockery is still valued in terms of its use value, but by the one set out in the moment of exchange.²⁰ It will probably be viewed as less personal and thus at times conceived of in cost/benefit terms (is it worth buying a new set? Does this set do the job well enough?).

¹⁸ Ibid., pp.134-135.

¹⁹ This does not preclude the possibility that it could later be considered as fungible property, following a bitter divorce, for example. This is what Frow means by ‘in and out of the commodity state.’

²⁰ Though not exclusively. The crockery could still become personal property e.g. if it was a deceased grandmother’s crockery set. In this instance, the property has taken on a use value meaning that is

What we are thus describing is the *meaning* that is attached to commodities. Whereas market rhetoric is keen to see all objects as easily commodifiable, those objects which have taken on a personal meaning, though they are probably already commodities, are not allowed to be valued in exchange value terms. They are not allowed to be conceptualised as commodities. When there is an attempt to commodify such items, there is generally a contestation. Frow and Radin's examples both concern the expansion of commodification into new areas (such as selling kidneys and ethnobotanism) and the ensuing widespread social concern about encroaching commodification. These occur when there is a general social agreement as to what should be market inalienable. However, there are also many *individual* instances of contested commodities. The following quote from a tape collector is a statement affirming that his tape collection could not possibly be commodified. Though he is not conceptualising it as such, he is making a statement that his personal property cannot be valued in commodity terms:

I couldn't put a price on them. I would let anybody copy them. It's not monetary, though. They're valuable to me because I'm into the music... That's their value.²¹

These types of contestation occur all the time ('they mean more than money'). I will discuss the strategies that people use to 'remove' their property from the commodity sphere below.

Gaines' book Contested Culture concurs about the importance of meaning to commodities. Her book is heavily influenced by poststructuralist understandings of the meaning of a work of art described earlier in the thesis through the vessel of Barthes. She discusses intellectual property law through this lens and argues that intellectual property law contains a dichotomy of circulation and restriction which reflects this uneven commodification. However, what this also shows is that the law 'is able to serve opposition to the interests of capital even though it is bound to those interests.'²² So while copyright law supports the commodification of cultural objects, it also contains ideological features which challenge such commodification. Quoting Anderson and Greenberg, she points out how the law is an arena where contestation occurs:

extra to that when the crockery was originally purchased and would thus have moved towards the personal property end of the continuum.

²¹ In Neumann and Simpson, 1997, p.327.

²² 1991, p.7.

...the acceptance of legal ideology may be uneven, depending upon the particular case at stake. People do not take law into account in carrying out their affairs. When they do, however, they do not merely *follow* the law. They attempt to evade it, they bend it to their purposes and assert their own interpretations of what it is and should be. So, too, they may calculate the likelihood of law enforcement in organizing their conduct.²³

Bringing Radin, Frow and Gaines together, my argument is that bootlegs can be seen as an example of a contested commodity. This contestation is both aesthetic and legal illustrating the comments made by Gaines above. Bootlegging is explicitly a challenge about the ownership of popular music. It challenges the record companies' right to dictate what music an artist can release and what music can be heard by the public. Its proponents argue that the record industry is not in tune with the needs of artists or listeners. It is also explicitly a legal challenge. Even those collectors who do not know the intricacies of the law are aware that they are participating at murky edges of legality (indeed, some think that their activities are illegal when they are not). Thus, bootlegging, as it 'call[s] into question the proprietary rights of popular music' provides an explicit legal challenge.²⁴ However, this legal challenge is both produced by and reproduces an aesthetic challenge concerning the commodification of popular music.

Some of the reasons that the commodification of popular music has been contested have already been discussed. These reasons can be grouped under three headings, which I have called 'modes of understanding'. These modes of understanding are: issues of personal identity; art music reasons; and folk music reasons. In varying degrees, these modes of understanding affect bootleg collectors and bootleggers' opinions toward the commodification of popular music and feature as the bases of their contestation.

Before I go on to detail these modes of understanding, however, I feel that it is necessary to discuss the conscious awareness of bootleg collectors. Both the verb 'contest' and the adjectival 'contested' connote some kind of activism on the part of the people involved in the contestation; a contested commodity is, by definition, a political event. This can be seen quite straightforwardly with the contested commodities that Radin discusses – that there is a general popular feeling against the commodification of

²³ Nancy Anderson and David Greenberg, (1983), 'From substance to form: the legal theories of Pashukanis and Edelman' in Social Text 7 (Spring-Summer), quoted in *ibid.*, p.29. Emphasis in original

²⁴ Neumann and Simpson, 1997, p.320.

babies can be confirmed by browsing through the popular press. Similarly, the current discussion in the UK concerning genetically modified foods is an explicitly political issue. These examples pose no problem for scholars working on the basis of contestation.

Popular music, and popular culture in general, pose a greater problem for utilising the word contestation. For, as Cavicchi points out, popular music fans tend not to think of their fandom in political terms; 'many cultural studies scholars portray fans as rebels fighting against the tyranny of a "consciousness industry". However, I do not spend a lot of time thinking about record companies, or how to "resist" them'.²⁵ Cavicchi argues that fans do not contest the commodification of music in the way I am describing, stating that 'trading unauthorized recordings is more of a social activity than a political one.'²⁶ He argues that fans merely ignore the industry: 'fans' general stance toward the music business could be better characterized as a kind of indifference or disregard...they [see] the business as incidental to their connection with Springsteen.'²⁷

We are returning here to conventional criticisms of subcultural studies; they read too much into subcultural activity and the participants of such subcultures would not recognise themselves in the studies of their cohort. Subcultural members (including the subculture of bootleg collectors) rarely see themselves in the role of class warrior. I do not intend to enter this old debate here, but despite a lack of class consciousness on behalf of everyday participants, it is still possible for an act to have unintended political meaning. I find it impossible to see how knowingly participating in an illegal activity (bootlegging) cannot *not* be seen as a form of political activity, even if the individual involved only has a personal or aesthetic awareness of why they are buying a bootleg. Both bootlegging and fandom have been labelled as deviant activities and individuals rarely enter into deviancy without some idea of what they are entering into. Bootleg collectors are not completely blind to the political implications of their activities.²⁸

But let us now turn to the reasons why the commodification of popular music may be contested. The first mode of understanding is concerned with personal identity. Music is an extremely important cultural marker for developing one's identity, both individually and collectively (through the experience of being black, female, gay... This

²⁵ 1998, p.8.

²⁶ Cavicchi, 1998, p.79.

²⁷ Ibid., p.61.

²⁸ A further point is that, if Cavicchi is correct and fans merely ignore the industry, then this is in keeping with the idea put forward in chapter 6 which stated that one of the functions of Romanticism for the music industry is to make the artist-fan relationship the most prominent in popular music. The record industry is generally quite happy to be ignored.

is particularly so in popular culture, where all its dominant forms have risen from dispossessed social groups²⁹). Frith argues that ‘music is especially important for our sense of ourselves because of its unique emotional intensity – we absorb songs into our own lives.’³⁰ Cavicchi’s work on hardcore Springsteen fans (the type of fan who is likely to buy bootlegs or trade tapes) spends a great deal of time on the importance of Bruce Springsteen to these individual’s sense of selves. My discussions with Dylan fans affirm this: just as some individuals may state that their sense of being a Christian or a Jew are important for their sense of personal identity, for Dylan fans, being a Dylan fan is an extremely important way of conceptualising their own identity. Their personal identities are shaped (not exclusively) by both their individual relationship to the artist and his music, and by the social positioning of their fanaticism (in relation to the mainstream audience member, family and friends who are not devotees, and the community of other fans).³¹ Cavicchi defines fandom as a way of creating meaning in one’s everyday life,³² concluding ‘fandom is not some particular thing one *has* or *does*. Fandom is a process of being it is the way one *is*.’³³ In another context, this is widened by Frith who states ‘music gives us a way of being in the world.’³⁴

The importance of popular music for both individual and social identification leads to two types of personal property interests that cause a reluctance to see popular music as an everyday commodity. The first is that the meaning of certain popular music becomes part of the personal attributes of the individual. Whether this is by a process of an emotional connection to the work itself or through a process of association with personal events external to the actual song itself (‘they’re playing our song’), individuals carry the meaning of songs around with them as part of their personal identity. This is why Frith can state ‘cultural judgements...aren’t just subjective, they are self-revealing.’³⁵ The second is concerned with objects rather than attributes. These are the external embodiment of the musical meaning that people carry round in their identity. This musical meaning, which is part of an individual’s will, becomes externalised onto the everyday objects of popular music. While this includes the music carriers (CDs, tapes), it is perhaps more pertinent to items such as ticket stubs, posters, collections of

²⁹ Frith, 1998, p.274.

³⁰ Ibid., p.273.

³¹ Cavicchi, 1998, pp.134-184.

³² Ibid., p.9.

³³ Ibid., p.59. Emphasis in original.

³⁴ 1998, p.272.

³⁵ Ibid., p.5.

books/interviews.³⁶ Because of their importance to identity formation, these objects can be seen as examples of personal property. Radin's 'thick' understanding of personhood, within the sphere of popular music, would therefore include both personal attributes (ways that songs become absorbed into our identities) and the external objects upon which the meaning of such attributes has been imbued (such as a plastic red cup. The meaning of this cup has nothing to do with the original use value of the object). The ways that popular music becomes part of personal property provides the first mode of understanding why the commodification of popular music is contested.

The second mode of understanding why the commodification of popular music is contested is the art music justification. As I have been detailing in this thesis, popular conceptions of art are based upon an idea of incompatibility between art and the market that are the result of the bourgeois seizure of Romanticism. As Appadurai states, 'it is typical that objects which represent aesthetic elaboration...are, in many societies, not permitted to occupy the commodity state (either temporally, socially, or definitionally) for very long.'³⁷ Thus Van Gogh's *Sunflowers* is not thought of as a commodity – like most art, it is seen as *above* the market, a reminder of Woodmansee's argument that art is a displaced theology – despite the fact that it has a defined exchange value (not only for the special moment of commodity exchange, but also every day for insurance purposes). The sociological bases of such an attitude have already been discussed in this thesis but this leads to the situation where, if popular music is to be 'valid' it must be seen to be above the market. This is the second reason why the commodification of popular music is contested, and is conceivably the most widespread mode of understanding.

The third mode of understanding is the folk music ideology. The folk ideology is that for music to truly be 'popular' it must have arisen from the people. Folk music contains a bottom-up rather than a top-down idea of creativity. Thus folk performances are arranged to minimise the distance between performer and audience, and the use of amplification is discouraged because technology is seen as distancing. In this mode of

³⁶ It is perhaps the case that for fans who have large collections of such paraphernalia, the personal importance of the actual music carriers is diminished. It is the meaning attached to the paraphernalia that are important (for reasons of authenticity that I will discuss in the next section). For example, sad though it is, one of the most important items in my own collection is a red plastic cup used by Dylan on stage at Brixton in 1995. This is more important than any music carrier, which is replaceable. For non-collectors, however, the physical music carrier comes to symbolise the emotional meaning of the song, as in the following: 'Charlie I think about you, every time I pass a filling station/ On account of all the grease you used to wear in your hair./ I still have that record! Little Anthony and the Imperials/ But someone stole my record player – well how d'ya like that?' Tom Waits, 'Christmas Card from a Hooker in Minneapolis' (from the album *Blue Valentines*) 1979.

³⁷ 1986, p.23.

understanding, authenticity is judged not by standards of individual genius (which is one of the reasons why Dylan was viewed so suspiciously by the folk movement), but by tradition, by arising out of the collective. The development of rock music came from a number of musical styles that 'belonged' to the people: blues from the dispossessed Afro-Americans, country music from the Southern white trash. Gillett argues that rock'n roll was also a bottom-up creation:

...audiences or creators can determine the content of a popular art communicated through the mass media. The businessmen who mediate between the audience and the creator can be forced by either to accept a new style. The rise of rock 'n' roll is proof.

With rock 'n' roll, major corporations with every financial advantage were out-manoeuvred by independent companies and labels who brought a new breed of artists into the pop mainstream – singers and musicians, who wrote or chose their own material, whose emotional and rhythmic styles drew heavily from black gospel and blues music. The corporations took more than ten years to recover their positions, through artists with similar autonomy and styles.³⁸

Rock music is often thought of as the people's music, counterposed to 'their' middle class/middle aged art-music. The dichotomy may be misleading, but it maintains some purchase in popular music ideology. Authenticity (like Springsteen or The Ramones) means staying true to your roots, by remaining 'real'. The back cover of Cavicchi's book describes Springsteen thus; 'As a rock-and-roll troubadour, "the Boss" speaks not only *for* his many fans but *to* them, and often with a directness or sincerity that no other performer can match.'³⁹ Commodification is bad in the folk ideology because it distances the artist from the audience. Gillett's quote above gives one example of this ideology ('the businessmen who mediate...'). This folk authenticity is extremely important for the rationale of bootlegging. One of the biggest motivations behind collecting bootlegs is that they are an attempt to bridge the distance between artist and fan 'created' by the industry, to make the artist more real, to turn them into a real person. This distance is seen as created by the commodification of music and thus the folk ideology provides the

³⁸ 1983, p.iix.

³⁹ Emphasis in original. Here, Springsteen is described both in folk music terms (as a 'troubadour', '*for* his fans') and as a Romantic genius ('*to* his fans').

final mode of understanding for seeing why the commodification of popular music may be contested.

Romanticism versus Romanticism

We can perhaps now see why the record industry reacts against bootlegging in a manner disproportionate to its scale. If bootleggers are challenging the commodification of popular music (a commodification the industry does its best to disguise) and the very terms of upon which commodification relies (the Romantic author), the significance of bootlegging extends well beyond its size. Bootlegging challenges the authorship and ownership of popular music.

However, although the industry may seek to destroy bootlegging because of these reasons, the relationship between bootlegging and the legitimate industry is more complex than all out war. Bootlegging may not pose the ideological threat that is assumed. In fact, bootlegging actually provides an ideological support for the music industry, because the motivations that I have described as being behind bootlegging, and behind the contestation of the commodification of music, are themselves the result of Romantic ideas about art and creativity. Bootlegging may actually be the *most* Romantic arena of popular music.

To begin with, the ideas that commodification is a) a bad thing, and b) something that happens to a pre-existing work of art, are both the result of a crude dichotomy of art and market that crystallised during the Romantic period. Bootleg collectors rail against the music industry, complaining that it does not release the best music, that it forces their artists to release the most commercial, rather than their best, work. However, the very terms of this contestation only occur because of the Romantic ideology.

This Romantic ideology posits the authentic artist as trapped within a monolithic industry that is worried about capital accumulation rather than artistic freedom of expression. Fans thus try to break down the industry structure to make contact with the real person, because the work of art is supposed to flow directly from the soul of the artist to that of the listener. The collector must therefore reach out to the specific individuality of their chosen star (which is the reason why they are connected to that particular star and not any other). It is the cult of the author that drives the desire to hear bootleg recordings.

Bootleg fans often see themselves as having a more direct connection to the artist, able to see the 'whole artist' through their collections. This quote from a fan, followed by an explanation by Cavicchi, reveal this ideal in practice:

I identify with Springsteen the man as I understand him through his work.

...among Springsteen fans, the idea of connection means more than just having an affinity for Springsteen's music; it means making the music a deeply felt part of one's life, of having an ongoing, shared relationship with Springsteen the artist. Indeed, fans talk very specifically about the process of forming a connection with Springsteen.⁴⁰

This idea of making a connection is grounded in the Romantic notion that an artist speaks directly from his soul to our own. What we have in bootlegging is the same phenomenon that exists in the legitimate music industry, except in a more intense form. Cavicchi points out that fans 'ignore' the record industry by a twin process of developing Springsteen as an authentic person and developing methods of supplementing record industry practice – bootlegging, trading and ticketing strategies.⁴¹ However, this second strand is dependent upon the first; if there is no conception of an authentic artist outside of the confines of record industry practice then there is no need to acquire bootlegs. The need for bootlegs only arises because of a conception of an authentic artist that exists outside of the commercial world. This reliance upon an authentic individual trapped in the music industry is probably the most Romantic aspect of bootlegging for it invokes key Romantic assumptions of authenticity and creativity. Collecting bootlegs enables an individual to feel much closer to an artist by turning the commodified star into a real person and it enables them to experience the creativity of the artist uncorrupted by commercial interest.

You may recall that Woodmansee states that art became a 'displaced theology' during the Romantic era. Curiously enough, religious metaphors are often used by bootleg collectors to describe their emotional and spiritual attachment to the artist. Cavicchi states that his 'fandom feels to me far more like religion than politics'⁴² while one collector in Neumann and Simpson's study stated:

⁴⁰ Cavicchi, 1998, pp.40-41.

⁴¹ Ibid., p.63.

I think everyone's looking for something to believe in. I'm not a very religious person, so the closest I come to religion is through music and art. So I guess, yeah, I guess that gives me something I put mystic value to. There's a lot of special people out there who do really wonderful things...⁴³

These religious metaphors are only necessary if they are married to the idea of the artist as a supreme creator, and of religion as a displaced theology.

What we find in bootlegging, therefore, is a reliance upon, rather than a challenge to, Romantic ideas of creativity. While the actions of bootlegging (the public taking some control over artistic output) seemingly offer a challenge to Romanticism, the reasons behind bootlegging are actually extremely Romantic. Bootlegging should provide a way to demystify the creative process. After all, if you have 26 different takes of *Strawberry Fields Forever*, it should diminish the idea of inspirational creation. Yet it only seems to reinforce the elevated position of the author. The activity of bootlegging reinforces the ideology it seemingly challenges in copyright.

Bootlegging depends upon the ideology of the music industry for notions of its own worth (bootlegs are valued for their rarity and authenticity in comparison to the mainstream market), for its artistic judgements (it is only the geniuses like Dylan and Hendrix, or the authentic artists like Springsteen and Young that get bootlegged) and for its material (outtakes recorded in industry studios and industry supported live tours). The myths of the music industry create the need for bootlegging, which challenges the industry but ultimately finds the myths inescapable.

...attempts to get beyond the star making-machinery inevitably reaffirm it. The use of bootleg tapes to deconstruct the artist's image occurs within a tension between the idea of the artist as a "normal" person, and the fact that ownership of the artist's bootleg is valuable because he or she is a "star."⁴⁴

Through its utilisation of Romantic discourse, the record industry creates a picture of an individual artist within the music industry. However, the light of inspiration also casts a shadow for it creates the understanding that there is an autonomous, creative person outside of the confines of what the record industry contains. This ideology works against the industry because fans come to see the record industry as unable to reflect the

⁴² Ibid., p.8.

⁴³ Neumann and Simpson, 1997, p.335.

whole creative range of their artist. Further, they see the industry as harmful to their artist. The spectre of commodification threatens the artist's individual creativity. This is what creates the desire for bootlegs. Once this alternative world exists, it becomes easier for collectors to see their artist in non-commodified (mass produced) forms and thus leads to an intensification of ideas of authenticity, resulting in further rejection of the music industry's attempts to commodify their artist. What we have, in a formal reflection of copyright law, is Romanticism versus Romanticism.

It is a reflection of copyright law because Romanticism is at once both a challenge to commodification and its ideological support. Kopytoff (1986) has stated that a process of 'singularisation' is used as the means to withdraw something out of the sphere of exchange. This process can occur individually and collectively: 'publicly recognized commoditization operates side by side with innumerable schemes of valuation and singularization devised by individuals, and groups, and these schemes stand in unresolvable conflict with public commoditization as well as with one another.'⁴⁵ These are the processes discussed in the description of Radin's thesis. The problem with this process, as Kopytoff notes, is that, by making an object more unique and singular, one makes that object more valuable, thus increasing its worth as a commodity. This is the major weakness of Radin's theory. The fact that all of her 'common sense' examples of contested commodities refer to the body (baby selling, selling kidneys) suggests that property in the body is the only thing left to personhood. The echoes of Locke's argument that each individual has a property right in their own body highlight the aporia of her account; she does not appreciate that the personhood which she posits against commodification is also the primary support for commodification. This is particularly so in copyright. Singularisation (the Romanticisation of authorship) both contests and supports commodification. The unique and individual person – that which seems least amenable to commodification – is used as the basis of singularity and originality that forms the foundation of copyright law.⁴⁶

There is a dialectical relation between bootlegging and the record industry. Bootlegging reinforces the ideology that supports the development of a legal subject capable of being an author, thus strengthening the foundations of copyright law which it outwardly challenges. It is parasitic upon the ideology it challenges. While within bootlegging there is the potentiality of developing a positive public right in copyright based on understandings of creativity different from Romanticism, it actually reinforces

⁴⁴ Ibid., pp.333-334.

⁴⁵ Kopytoff, 1986, pp.79-80.

such Romanticism and thus maintains a social environment where bootlegging can only ever be an illicit activity.⁴⁶ While bootlegging challenges *ownership* it reinforces *authorship* and can thus only exist in a dialectical relationship with the record industry.

The record industry is so concerned about bootlegs (which have a negligible, possibly positive, economic impact) because they challenge the ideological assumptions of authorship and ownership upon which the industry rests. The record industry sees bootlegging as a threat to their control of the commodity which, as explained in the first half of this thesis, is greatly facilitated by Romantic ideas of creativity. However, the ideology of the music industry creates needs which it cannot satisfy for it allows for the possibility of music outside of the industry's boundaries. This is why bootlegging developed. But while bootlegging fights against the record industry, it is also dependent upon it. This creates not so much an impasse, as the terms of the struggle constantly change, but a situation where neither one can ever come out on top. The record industry must fight against bootlegging because it challenges ownership and authorship, but it relies upon bootlegging to authenticate its own ideologies of authenticity. It is the activities of the bootleggers that 'prove' the authentic worth of the artist in question, and feed into his artistic reputation, and thus sales. The industry therefore cannot merely stamp out bootlegging as this would damage a fundamental ideological notion of authenticity, which risks lessening the importance of popular music for everyday feelings of identity. However, the record industry cannot just accept bootlegging either as that would undermine the notions of authorial autonomy that act as a support for the industry's ownership of the product. Bootlegging challenges the ideas of Romantic authorship by wresting control away from the author but if it were successful in abolishing the Romantic author, the bootleggers would have nothing to bootleg. Bootlegging constantly hammers at the doors of the industry, decrying it as inimical to art, yet it depends upon the industry for its own sense of authenticity. The moment that bootlegging was accepted as legitimate, it would be destroyed (this is what almost happened during the protection gap era). These are the relationships that are lived out in the day to day activities of bootlegging and anti-piracy initiatives. These are the terms of the dialectical relationship.

⁴⁶ Frow, 1997, p.147.

⁴⁷ This is why bootleg collectors do not seek legitimacy, or want the mainstream industry to cater for them: 'most bootleggers are not in search of social legitimacy. The deviant quality of their practices as bootleggers is an essential component of what they produce. That is, their recordings hold value precisely because they are unauthorized, unique, and do not carry a stamp of approval by the music industry.' Neumann and Simpson, 1997, p.339.

This relationship reflects the dialectic relationship between Romanticism and capitalism that I have already discussed. Romanticism and capitalism are not two distinct poles, they are mutually constitutive. Romanticism, developing concurrently with capitalism, creates an idea of the individual that is both a reaction against capitalist development and an ideological foundation for capitalism's individualism. As I explained in chapter 2, Romanticism is not something that stands outside of capitalism, it is actually a bourgeois ideology.

This does not mean, however, that Romanticism is a mere lackey of capitalist accumulation. Rather, Romanticism develops in ways that are conflictual with capitalism. The development of the unique, self-aware individual results in the legal subject capable of owning (copy)rights, but it also results in the need to hide the commodification of individual traits, as I have been discussing in this thesis. Romanticism is thus not just an instrument of capitalism, being manipulated by the record companies in some kind of conspiratorial fashion. It is part of the capitalist hegemony that opens up the possibility of challenging capitalism from within its own ideology. To borrow Gramsci's phrase, Romanticism is part of capitalism's soft underbelly.

The relationship of bootlegging to the record industry thus reflects the nature of Romanticism within copyright. Romanticism creates the system whereby legal subjects can become authors who can then alienate their copyrights to capital. But within Romanticism, there are the seeds of its own challenge, for the elevation of art creates the understanding that art must be above the market. This tense relationship, however, often results in the ignoring of the public right in copyright. The phenomenon of bootlegging seems to be one area where the public are trying to reclaim their right. However, it too remains caught within the dialectical nature of Romanticism: even though bootlegging challenges the legitimate record industry, the activities of the bootleggers can only ever reinforce its power.

Afterword

The future of bootlegging.

I am a bootlegger

Bootleggin' ain't no good no more¹

This afterword brings the history of both copyright and bootlegging up to date. The 1990s witnessed a major change in intellectual property protection with the development of the TRIPs agreement in 1993. Since TRIPs, there have been a number of specifically anti-bootlegging additions to copyright in the last ten years. Bootlegging is currently under unprecedented legal pressure. However, perhaps the greater threat to bootlegging stems from new technological developments, particularly the development of the recordable CD (CDR). As well as describing these current pressures, this afterword opens up further research possibilities in the research of both copyright and bootlegging.

Copyright in the 1990s

The varying nature of the loopholes that created the protection gap meant that it was difficult to try and close them one by one. The American labels, still not particularly well protected in Europe, sought a new avenue to tighten their defences. With co-operation from the US film industry, they put pressure on their own politicians to get America to take a leading role in international copyright. The first outcome of this was the US' accession to the Berne Convention. However, although this strengthened authors' rights in the US it was merely the appetiser to America's main goal –to bring copyright (and other intellectual property rights) under the auspices of GATT.²

The World Intellectual Property Organisation (WIPO) had made attempts to modernise the Berne convention in the 1970s and early 1980s but had failed due to the need to obtain a consensus from such a wide variety of countries. The US became increasingly frustrated with WIPO which it saw as being run by cultural ministers rather than trade negotiators and giving too much leeway for minor players.³ Armed with the

¹ Blind Teddy Darby, *Bootleggin' ain't no good no more*.

² Fraser, 1996, p.296.

³ Oman, 1994, pp.19-20.

momentum it had achieved in NAFTA, the US proposed that for the first time, intellectual property should be included in GATT negotiations.⁴

The US received support from Japan in this motion but that was all.⁵ The inclusion of intellectual property protection was extremely contentious. There were two debates occurring: firstly, there was a debate between developed and developing countries over whether intellectual property should be under GATT at all. Developing countries, attempting to protect their own cultural identity and economic well-being (in a manner similar to the US in the nineteenth century) argued against inclusion. There was also a split among the developed nations over the provision of moral rights. The US argued that as TRIPs was solely concerned with the trade aspects of intellectual property then there was no place for moral rights. Countries with strong moral rights provisions, such as France, argued against this position.⁶

The outcome of the negotiations was that an agreement on Trade Related Aspects of Intellectual Property (TRIPs) became part of GATT. This was an undoubted success for the US, and marks a change in intellectual property protection of unprecedented significance, at least since Berne. GATT not only establishes minimum levels of protection, it also establishes minimum levels of enforcement. It requires all members to enact 'substantial criminal penalties' to protect IP rights.⁷ Crucially, it opens up the possibility of cross-sectoral retaliation. Though a developing nation may not be too concerned if the US were to enact sanctions in the sphere of intellectual property, it is of more serious significance if the US threatens to stop importing a country's rice unless they protect US copyrights. UNESCO and WIPO have now been effectively overtaken by the World Trade Organisation (WTO, established by GATT) as the place to settle copyright disputes.⁸

⁴ There were intellectual property provisions of the North American Free Trade Agreement between the US, Canada and Mexico. There are two things worth noting: firstly, Mexico offers the same moral rights for Authors as France does, which gave the US a useful taster of what to expect in the GATT negotiations; secondly, the US was explicitly exempted from any moral rights provisions in NAFTA while the other two countries were bound by them. NAFTA states 'this Agreement confers no rights and imposes no obligations on the United States with respect to Article 6bis of the Berne convention, or the rights derived from that Article.' This is remarkably similar to the TRIPs agreement which states '... Members shall not have rights or obligations under this Agreement in respect of the rights conferred under Article 6bis of ... [the Berne] Convention or of the rights derived therefrom.' See Fraser, 1996.

⁵ It is no surprise that Japan would support the motion: in the 1980s, Japanese hardware manufacturers had taken over a number of major US record labels.

⁶ Long, 1995, p.537.

⁷ Browne, 1995, p.43.

⁸ Fraser, 1996, p.313.

Substantively, TRIPs established the Berne convention as the minimum standard of protection, and the recognition of national treatment as standard.⁹ Members of the WTO are obliged to comply with articles 1-21 of Berne, and the appendix. Article 6(bis) – the section covering moral rights – is expressly exempted from this. However, Berne only covers the rights of authors. For our present purposes, the incorporation and strengthening of the neighbouring rights provisions of the Rome Convention are more important.

TRIPs requires that all members have some form of protection for sound recordings. This may or may not be copyright. The US, believing Rome to be insufficient, pushed for full copyright protection. The EU refused this due to the lack of performers' rights in the US. The compromise was that Rome was established as the minimum level of protection for sound recordings but members are allowed to protect using copyright if they desire. Neighbouring rights receive strong protection under TRIPs and the minimum level of protection for neighbouring rights was increased from Rome's twenty years to fifty. Performers are granted the right to prevent unauthorised fixation or transmission of their performances, as well as the right to prevent bootleg recordings of their performances for fifty years. All of these features are a strengthening of the protection offered by the Rome Convention.¹⁰

On 8 December 1994, in response to their TRIPs obligations, the Uruguay Rounds Agreement Act (URAA) was signed into US law. This includes significant strengthening of the US' anti-bootlegging laws and, for the first time, grants performers some rights under US copyright. In brief, the new law prevents: 1) the recording of a live performance without the consent of the performer; 2) the manufacture and reproduction of such recordings; 3) the distribution or trafficking of such recordings; and 4) the unauthorised transmission of such recordings. Liability exists regardless of whether the performance occurred within the US or elsewhere. There are also substantial criminal penalties for these offences, as required by TRIPs. A first offence under this act is liable to five years imprisonment or a \$250,000 fine while a second offence brings ten years or a fine.

The other major copyright initiative in this area in the 1990s was WIPO's Performance and Phonograms Treaty in 1996. This treaty is the first to grant moral rights to performers, specifically the rights of attribution and integrity. These moral rights are

⁹ 'National treatment' means that a national of another country must receive the same protection as a national from the host country in a copyright dispute. This concept is absent from the Rome Convention and was one of the reasons for the protection gap.

¹⁰ Martin, 1997, p.163

not transferable or waivable. The other notable additions under WIPO are that performers now have the 'exclusive right' to authorise fixation (same as URAA) and it is the first treaty to ensure that contracting states must protect against technological devices designed to infringe copyright.

The new laws certainly seem to have made an impact. In the year prior to URAA (1994), the FBI seized 3,000 bootleg CDs. This increased to 85,000 in 1995 and 1.2 million in 1996.¹¹ A huge bust in Miami in 1997 brought in 800,000 CDs and resulted in the arrest of thirteen of the most significant bootleggers.¹² TRIPs has also forced other nations to fall into line: Germany amended its copyright laws in 1996;¹³ and Luxembourg, under pressure from the IFPI, EU and US, recognised neighbouring rights for the first time in 1997.¹⁴ From the legitimate record industry's perspective, it seems that they now have an effective weapon to deal with bootlegging.

There have been major criticisms of the URAA by American legal scholars, however, who question the constitutionality of the new law.¹⁵ As the American Constitution was an early guarantor of the public right in copyright, it is interesting to see how copyright in the US has swung away from the public and towards authors. Firstly, it appears that URAA is perpetual; there is no end date specified. The US has created a law akin to copyright that is as eternal as the one sought by Wordsworth. This contradicts the constitution which grants authors rights for 'limited times.' Secondly, the copyright section of the constitution offers protection only to 'writings.' 'Writings' has subsequently been expanded to encompass a wide array of copyrightable artefacts, but it has always been accepted to mean that there is some fixed medium of expression to protect. For the first time, the URAA offers protection to an unfixed entity (a live musical performance). These issues have led some commentators to conclude that the URAA cannot be based upon the copyright clause of the constitution.¹⁶

¹¹ According to Goodwin, over 99% of bootlegs seized in the US in 1996 were manufactured abroad (1999, p.367).

¹² Goodwin, 1999, p.348. While these numbers may seem high at first glance, they should be contextualised. Firstly, the Miami raid accounted for an estimated 75-95% of all bootlegs entering America that year. (*Live Music! Review*, 5:5, May 1997, p.6.) Secondly, the raid occurred at the end of the protection gap era, so production figures for bootlegs were still artificially high. Thirdly, the retail value of these CDs amounted to only 0.2% of legitimate American sales in the same year (Hoffman, 1997).

¹³ Goodwin, 1999, p.364.

¹⁴ Ibid., p.363. There are countries still holding out however: Taiwan insists that its copyright laws already do enough to satisfy article 14(1) of TRIPs, although the US insists that it produced 200,000 bootlegs in 1996. Israel has a glut of CD manufacturing plants which supply bootleg companies based in San Marino.

¹⁵ See for examples, Goodwin, 1999, Deas, 1998, Nimmer, 1995, Long, 1995.

¹⁶ See Goodwin, 1999, and especially Nimmer, 1995.

This was the challenge made by American bootlegger Ali Moghadam.¹⁷ Moghadam was found guilty under the URAA following the Miami bust in 1997 but appealed, arguing that the new law was unconstitutional because it protected unfixed performances. The US Supreme Court did not address the question of the copyright clause, but affirmed Moghadam's conviction by stating that even if the law was unconstitutional under the copyright clause, it was still constitutional under the commerce clause because TRIPs was a trade agreement rather than an international copyright agreement.

This decision clearly illustrates the trend in the last decade shifting intellectual property protection away from copyright and towards trade agreements. Nimmer, among others, is concerned by these developments, stating;

...the conclusion is that two centuries of rooting copyright enactments in the Copyright Clause now appears, from the present perspective, to have been simply a phase. It is difficult indeed to discern any limits here. If unfixed works can be protected perpetually with something akin to copyright, then what conceivable implementation lies beyond Congress's powers?¹⁸

Nimmer concludes that we have witnessed the 'end of copyright'.

With regard to this thesis, it is necessary to ask whether this fundamental shift in intellectual property protection repudiates the central argument regarding the prominence of the Romantic author in copyright protection. Does the shift to trade regulations diminish the importance of the author in copyright law? To a great extent, the answer is that its importance does not diminish. TRIPs essentially sharpens the teeth of copyright enforcers rather than changing the diet of copyright holders. Although neighbouring rights were strengthened (which conceivably can come into conflict with authors), they are still based on existing protection for authors. TRIPs incorporates the major points of the Berne convention (with one major exception) and so the author has not been decentred in copyright law. As Jaszi and Woodmansee state, 'new agreements which treat intellectual property as an international trade issue simply perpetuate and extend the traditional emphases of copyright.'¹⁹

The US' victory in removing moral rights from the TRIPs provisions could be seen as a blow to authors in their economic and political negotiations. But this is to

¹⁷ United States V Moghadam 1999, 175 F.3d 1269

¹⁸ Nimmer, 1995, p.1411.

follow the naïve assumption that copyright based on the Romantic author necessarily has to be to the benefit of individual authors, which has not been the case in this thesis. We must remember that it is the rhetorical uses of the elevated author that are at least as significant as the actual authors themselves. Despite the shift to trade regulation, it is still the Romantic author that provides the moral backbone to copyright extension. Indeed, now that intellectual property protection is more explicitly trade based, the moral element of the Romantic author may become even more important. It was certainly the author that provided the moral justification for America's push towards TRIPs, as Boyle explains

What explains this set of changes [from copyright to TRIPs]? At the moment, if one searches in the academic journals and the popular press, one is likely to find... a morality play. For a long time, the evil pirates of the East and South have been freeloading on the original genius of Western inventors and authors. Finally, tired of seeing pirated copies of *Presumed Innocent* or Lotus 1-2-3, and infuriated by the appropriation of Mickey Mouse to sell shoddy Chinese toys, the Western countries – led by the United States – have decided to take a stand. What's more, the stand they take is popularly conceded to have more moral force than that of United Fruit protecting its investments in Central America or Anaconda Copper complaining about nationalization in Salvador Allende's Chile. In this case, the United States is standing up for more than just filthy lucre. It is standing up for the rights of creators, a cause that has attracted passionate advocates as diverse as Charles Dickens and Steven Spielberg, Edison and Jefferson, Balzac and Victor Hugo. Thus the normal complaints of carping liberals within the United States has been distinctly muted. Using US power in the service of property is one thing, using it in the service of creative genius is quite another.²⁰

Authors may or may not do well out of TRIPs. Their bargaining power *vis a vis* publishers may diminish but TRIPs may open up the possibility of a perpetual copyright for authors. From the theoretical perspective of this thesis, this may not matter so much: the author is still being used as the moral masthead of copyright enforcement. To return

¹⁹ 1996, p.957.

²⁰ Boyle, 1996, p.123.

to the practical element of this thesis, however, we must analyse the possible outcomes of this legislation on bootlegging. It is to the future of bootlegging that I now turn.

New technology and the future of bootlegging

Despite the strengthening of performers' rights in the last decade as a way of attacking bootlegging, there is no reason to suggest that these legal pressures alone would lead to the demise of bootlegging. Bootlegging has faced other periods of intense legal pressure in the past and still managed to continue. However, when this legal pressure is combined with current technological advancements in sound recording, it results in a situation that could seriously threaten the model of bootlegging that was described earlier.

Bootlegs began life as a vinyl format. The analogue cassette was introduced in the mid 70s. As well as being the medium used for almost all trading, the cassette became a medium utilised by some bootleggers. It had many advantages over vinyl: it was possible to produce a great many of them easily without having to risk using an external pressing plant; tape covers were easy to print up – no glossy colour photos were expected because they were sold cheaply; there was a very quick turnaround time for tapes – a couple of days rather than a couple of months; it was possible to tape any show; and they were smaller, so they were more portable – you could carry them to any market, record fair or street corner, open up the suitcase and sell. This resulted in a two tier bootleg market; vinyl bootlegs were two or three times more expensive, but were more 'authentic' (in terms of the artefact value of vinyl collecting) and generally better produced. The features of bootlegging, as previously defined, existed only for vinyl bootlegs. The tape was a cheap and nasty medium, designed for getting the music out in quickest and easiest manner, but with no inherent collectability – the ease with which a tape can be reproduced means that it has hardly any exchange value. Thus tapes were extremely cheap, and their strongest points were immediacy and convenience.

The CD took a little longer to reach the bootleg world than it did the mainstream market, due to the problems of finding a CD pressing plant willing to produce some bootlegs. When it did arrive, however, it had a devastating impact. It is obvious that the CD format would impinge upon the market share for vinyl. What was less expected, however, was that it would also take over from analogue cassette. Collectors bought cassettes because they were more convenient than vinyl. With their size and track markings, CDs became at least as convenient as cassettes with the bonus of digital sound

quality that did not deteriorate with each play, and glossy colour covers. CDs had a greater collectability than tapes. They were of course more expensive than cassettes but, with the price of bootlegs falling during the protection gap to the point that they were cheaper than official CDs, CD became an increasingly viable option to the collector.

In a mirror of the mainstream music market, CD destroyed vinyl as a medium and has since dominated the market. However in the last three years, the development of the CDR may prove to be the most significant format advancement in bootleg history.²¹

The CDR is technically different from a CD, but they both work on the same principle. A CD is pressed at a pressing plant. A glass master (GM) of the CD is made – this is a negative of the actual CD. The GM presses a series of hollows into the CD. When this is played on a CD player, a laser beam is emitted from the player onto the surface of the disc. The two different reflection times, from either the normal CD surface or the indented hollow, result in either a 0 or a 1 in digital code. These 0s and 1s are translated into analogue sound. A CDR however is not ‘pressed’ but ‘burned’. A CDR contains a layer of dye under its outer coating. A CD recorder emits a laser which then burns a hole in the dye. When played in a CD player, the reflective difference between the normal dye and the burned area is the same as an ordinary CD, which results in the 0s and 1s. So although the CD player does more or less the same thing with the disc, the creation process is significantly different. And while a CD has to be produced at an industrial pressing plant, the CDR can be produced anywhere. There are two different types of CD recorder; huge CD duplicators which can produce hundreds of CDRs at one time, but there are also individual recorders, either for a hi-fi or a computer, which are easier and quicker to use than an analogue tape recorder. Both of these can be operated from a bootlegger’s front room.

The CDR combines the sound quality of the CD with the convenience of the cassette and has been a boon in collecting circles. It is less of a phenomenon in the mainstream market, due mainly to industry attempts to bypass the CDR by the Minidisc (MD). The MD contains only 20% of the information stored by a CD and is thus much smaller, but it has many more editing facilities than a CDR. Collectors have been wary of the MD due to the amount of data that is lost. The CDR, however, is rapidly becoming the dominant format for trading music. If it has not yet surpassed the analogue cassette, it certainly will do so in the near future.

²¹ A brief word here on MP3, conspicuously absent from the discussion thus far. MP3 has been of minimal impact in bootlegging; collectors are wary of the sound quality of the format, and the immateriality is uncomfortable for many collectors. This may change in the future, but currently MP3 is a format mainly manipulated for piracy – the copying of current hits – rather than bootlegging.

As far as bootleg manufacture is concerned, the CDR is also a major development. Similar to the advantages in producing cassettes, the CDR is much easier to produce. There is no big financial outlay on making a GM, which is the biggest cost for manufacturing a CD. More significantly given the current climate, producing CDRs rather than CDs decreases the manufacturer's legal vulnerability. Firstly, they do not have to be produced at a factory, which decreases the risk of being traced. Secondly, there is no need to import the bootlegs, traditionally the most dangerous part of bootleg manufacture, particularly in the US. Thirdly, if the bootlegger is caught by the authorities, it is very difficult for them to know exactly how many of a bootleg the manufacturer is producing. There is no matrix number on the CDR and no production records to reveal a pressing size. The bootlegger need only to produce the exact number required at any one time, so there is no need to have 300 spare copies of a title lying if you are raided. The CDR therefore offers a number of legal safety nets for manufacturers.

As far as bootleg buyers are concerned, the CD is still viewed as more 'authentic' than the CDR. The CDR, due to its infinite availability and generally shoddy packaging, is viewed as less of an artefact than the CD, the same as the cassette was previously, though this may well diminish as more collectors appear who were not brought up during the vinyl era when records were viewed as a sensual artefact as well as a carrier of music.²² However, CDRs are currently maintaining price levels similar to CDs and thus many collectors will not buy them. This representative message posted to the newsgroup rec.music.dylan was a response to the question 'what is wrong with CDRs?'

Nothing, for trading. But it'll be a cold day in hell before I shell out big bucks for a bunch of CD-R's [sic] run off in some guy's kitchen. I don't care how professional the artwork is, when companies start cutting corners on the most fundamental aspects of the product, my wallet gets clamped shut.²³

However, collectors may soon have no choice. In the US, of the two most esteemed labels, Vigotone is now entirely CDR and Scorpio is moving in that direction. The most notable label in the UK, Doberman, is entirely CDR. In all three cases, the main reason

²² There are also scare stories concerning the durability and lifespan of CDRs.

²³ 14 March 2000, quoted without permission.

for this is legal pressure. The tremendous difficulty in importing bootlegs into both the US and the UK means that it is more sensible to make them in their own backyard. As the legal situation tightens, it is likely that CDR will take on a greater proportion of manufactured bootlegs.

If CDR does become a dominant manufacturing format, it may have significant repercussions on bootlegging. The less likely possibility is that a two tier market will once again emerge. CDs and CDRs will exist with a big price differential. CDRs will be packaged very simply, and be cheap music carriers, while the CD will maintain a position similar to vinyl that has as much to do with the collectability of the artefact as the music itself. CD pressing plants will of course still need work. If this is what happens, then bootlegging will continue much as it always has.

The second possibility however is that the glass mastered CD will disappear from bootlegging altogether. The first reason for this would be the legal pressures placed on both bootleggers and pressing plants. The second reason, however, is economic: with no outlay for a GM and a production run to match exactly the demand, there is much less economic risk with CDR. CDR is a format more suited to the small scale economies of bootlegging than CD. The third reason for the demise of the CD is related to competition between bootleggers. Unless the 'artefact value' of the CD retains considerable purchase, the CD will become unable to compete with CDR. The relatively slow turnaround time of the CD will mean that important shows are already out on CDR before a CD producer can get them out. Conversely, even when a CD producer gets a rare tape, once the CD is released it can be perfectly copied and re-released in days on a CDR. The CD producers will not be able to maintain a market advantage on a release for very long. This is exacerbated by CDR trading: traders can now make perfect copies of original boot CDs so fewer collectors are interested in buying the original bootlegs.

All of these factors point to the demise of the CD as a bootleg format. And while CDR may look like a boon to bootlegging, it is likely to reproduce the problems of the protection gap era. The proliferation of CDR may well lead to the demise of the type of bootlegging that I described earlier in the thesis. Traditionally, there has been an inherent quality control within bootlegging. Bootleg production (either CD or vinyl) is a risky business, both in legal and economic terms. As a general rule, the individual must have an interest in the music to make the risks worthwhile. Bootlegs therefore tend to prioritise aesthetic decisions over economic ones. The quality control also stems from an economic push which results from the high knowledgability of collectors. The key way

that a bootlegger could decrease the economic risks of bootlegging was to build a reputation about the quality of his releases.

A proliferation of CDR would have serious repercussions on the quality control element of bootlegging. Firstly, with the decreased risks involved in CDR manufacture, it is likely that, similar to the protection gap era, less committed manufacturers will be drawn to the industry. The majority of bootleggers will not be fans, but entrepreneurs looking for the 'dodgy middle ground'. If manufacturers lose the aesthetic impulse that drives so many bootleg releases, then all other aspects of the bootleg aesthetic become threatened. Secondly, the fact that CDRs can be made to demand means that there will be no urgency in sourcing the best quality tape - if a better tape arises, the bootlegger can just change their source. This makes reviewing and buying bootlegs extremely hazardous – how can you form an opinion of a bootleg if there may be an improved tape found tomorrow? Fan knowledgability will become more uncertain. This will be exacerbated by the growth of a proliferation of small bootleg labels, releasing a few dodgy titles and then disappearing and reappearing under a new name, it is impossible for collectors to rely upon the label (as the very first bootleg label called it) as a 'Trademark of Quality.'

Major labels such as Vigotone are currently trying to distinguish themselves through their packaging, but this is expensive and previous experience has shown the cheaper copies will always sell more than the expensive deluxe set. It is quite possible that we shall witness the end of major bootleg labels in the next decade. Which should be music to the ears of the record industry and to those traders who are against bootleggers. The problem for fans of unauthorised music is that the bootleg labels are a major factor in maintaining aesthetic levels in bootlegging. Despite the amount of digital media being used in trading circles, it is normally a commercial boot that offers the best sound quality. This is because, if they can be assured of recouping their expenses, bootleggers can afford to spend a few days in a recording studio cleaning up the source tapes. Furthermore, bootleggers' already limited ability to buy previously unavailable tapes will dissolve completely: there are countless tapes not in circulation where an individual, with no particular interest in the music, will sell them for the right price. One of the positive effects of the protection gap was that the increasing sales of bootlegs meant that traditional bootleggers could spend more on buying source tapes. One of the most important releases of the last decade – the 5cd set of Bob Dylan's *Genuine Basement Tapes* only saw the light of day because a bootlegger could afford to buy the source tape. If current legal pressures continue to impel traditional bootleggers to produce with CDR, it will remove the economic safeguard of finding and perfecting

good quality tapes, and a crucial creative element of bootleg production will be destroyed. This would be a pity for without bootlegging, a great proportion of musical history that record companies cannot or will not release will never be heard.

Appendix 1

The development of the *droit moral*

There is no one defining moment when moral rights became an accepted part of French copyright law.¹ This is partly because there is no doctrinal synthesis of moral rights. Rather, it is an aggregation of a series of rights and each of these rights has its own history. Interestingly, these histories occurred in the courts rather than in the legislature: Peeler states, ‘moral rights did not seem to be the destiny of French intellectual property law, but instead... resulted from practical encounters in the courts.’² In many cases the courts went against the spirit, if not the letter, of the 1793 law.³ The accepted distinction between civil and common law approaches to copyright becomes muddled in this instance. Although France is a civil law country it is the French judiciary, going outside its supposed boundaries, that promulgates the notion of the author’s moral rights.

The four main moral rights are: *droit de divulgation* (the right to determine when and whether a work shall be published); *droit de retrait* (the right to withdraw or modify a work already published); *droit a la paternite* (commonly referred to as the right of attribution. This is the right to be acknowledged as the author of a particular work); and *droit a l’integrite* (the right to not have anyone else alter the work in any way). These latter two are the most common of the moral rights. The remainder of this section shall give brief details of the case law pertaining to the development of moral rights.

The first indication of a shift in judicial policy towards authors occurred in 1832 with a controversy concerning the necessity of the registration of books to be protected by copyright. As already mentioned, registration is significant in understanding copyright because if copyright is grounded in natural law then the state cannot demand registration as necessary for copyright protection. In *Chapsal et Noel c Simon* the Cour de Cassation (the highest court in France) strictly applied article 6 of the 1793 act requiring two copies of a book to be deposited at the *Bibliothèque Nationale* for protection, thus prohibiting the authors from pursuing an action against Simon for

¹ The first use of the phrase *droit moral* is credited to jurist Andre Morillot before the Cour de Cassation in Paris 1878 (Swack, 1998, p.372). *Droit Moral* was finally codified into French copyright law in 1957.

² 1999, p.432.

³ ‘It is even surprising that moral rights insinuated themselves into French law at all because they were simply not an extension of the existing French law which had no underlying policies or principles advancing them.’ Peeler, 1999, p.435.

piracy. However, the lower courts rebelled against this decision and refused to follow it and the higher court eventually reversed its decision.⁴ The court's decision was grounded in 'natural justice' for authors – a significant departure from the conventional understanding of French copyright law.

The first mention of any of the moral rights is the *droit de divulgation*. This occurred in *Widow Vergne c Creditors of M. Vergne* in 1828. The composer Vergne had entered a composition into a national competition but died shortly afterwards, before the work had been published. A creditor, alert to the potential value of the composition, sued the widow for the composition to repay the debt. The Cour de Paris ruled that a work only comes into being when an author decides to publish it, and it could thus not be taken as property before publication.⁵ Despite the early mention of this right, it is only in the late nineteenth century that it begins to occur most noticeably. Swack lists three important cases.⁶ In *Whistler c Eden* (1895) the court decided that it was an 'artist's right to remain the master of his work, and to refuse to deliver it so long as he is not satisfied with it' and this right stands above previous contractual arrangements. In *Carco c Camoin* (1931) a painter who had cut up his works reacted when Carco put the pieces back together again to sell them. The court decided that 'although whoever gathers up the pieces becomes the indisputable owner of them through possession...[it] does not deprive the painter of the moral right which he always retains over his work.' In *Rouault c Vollard*, the painter Rouault had ceded 806 unfinished paintings, along with some finished paintings, to art dealer Vollard. They were stored in the gallery storage room and Rouault would sometimes return to continue their completion. When Vollard died, his heirs tried to take possession of the paintings but Rouault argued that they were unfinished and the court found in his favour, stating that the artist has a sovereign right to decide when a work is published.

The right of integrity first occurred in 1842 when a publisher was found guilty of pressing a book by Augustus Comte containing changes that the author had not authorised.⁷ However, it is the case of *Marquam c Lehuby* in 1845 that is often listed as the first case to define the right of integrity. In this case it was affirmed that an editor did not have the right to alter a piece of work submitted for publication. Swack argues that the development of the right of integrity is a twentieth century phenomenon, citing the

⁴ See Peeler, 1999, pp.441-446.

⁵ The court also decided that the public performance of a work did not count as publication. This was accepted by most copyright legislation until the introduction of the Uruguay Round Agreement Act (URAA) in the US in 1994.

⁶ 1998, pp.374-380.

⁷ Saunders, 1992, p.103.

Millet case in 1911 as the primary case.⁸ In it, the son of the painter Millet brought a suit against two publishers who both claimed the reproduction rights of the painting *Angelus*. The son argued that both reproductions severely misrepresented the original painting, to the detriment of his father's reputation. Millet thus sought an injunction against both reproductions by relying on the theory of moral rights. The court decided in his favour, stating in the 'superior interests of human genius' that art should be 'protected and kept as it emerged from the imagination of its author and later conveyed to posterity without damage from the acts of individuals with dubious intentions guided by some transient fashion or profit motives.'⁹

The first case defining the right of attribution was in 1836 and since that point 'French courts have continuously developed the right of attribution.'¹⁰ The 1836 case of *Masson de Puitneuf c Musard* involved the defendant's use of music in concerts (for which he paid the composer) while using a fictitious composer's name. The court held that the composer had a legal right to require his name to appear on the work. This subsequently developed into the position that an author's name must appear on a work unless the author specifically notes otherwise.¹¹ The final part of the *droit moral*, the right of retraction did not make an appearance in the courts until its codification into French law in 1957. This was the first time that moral rights were formally legislated in French law.

⁸ Judgement of 20 mai 1911 (Millet), Trib. civ. Seine, 1911 Amm. I.271. It is unlikely, given the significance of the Romantic movement in nineteenth century France, that the right of integrity did not appear until as late as the twentieth century.

⁹ Quoted in Swack, 1998, p.378.

¹⁰ Ibid., p.373.

¹¹ Ibid., fn.111.

Appendix 2

Methodology

The nature of this thesis presented a number of methodological problems, some of which were negotiated more successfully than others. The two halves of the thesis posed different questions: the first half created a number of literature problems while the case study gave rise to problems more associated with practical fieldwork.

Problems with the literature

That there is no specific chapter labelled ‘literature review’ in this thesis is indicative of the fact that it was not possible for me to produce an overall doctrinal synthesis of the disparate literature on authorship and copyright. This is because I have brought together a number of different issues (Romanticism, copyright, rock music, bootlegging) that are normally dealt with separately. Furthermore, these disparate areas are normally the domain of specific disciplines – authorship being studied by literary studies, copyright by legal studies, and so on. The lack of an overall *sociological* literature on authorship and copyright was one of the challenges that made the thesis appealing to me in the first place.

There are a number of problems with pursuing an inter-disciplinary study. The most significant of these is whether the disciplines in question can in fact ‘talk’ to each other. I was aware from the beginning that there may be an unresolvable conflict between the strands of literary theory that focus on the death of the author and the legal institution of copyright. The question, as I initially saw it, was whether there should be *any* relationship between literary and legal studies. This resulted in me spending a large proportion of the first year of my study barking up the wrong tree: spending too much time trawling through literary studies work on authorial intent.

As with most pieces of research, there was a certain amount of serendipity in finding the right tree. The link between Romanticism and copyright emerged from two sources. Firstly, the literary studies literature on Wordsworth’s role in UK copyright and secondly, from a small section of US legal scholarship that focused upon the Romantic author in copyright. These bodies of work could talk to each other and form the basis of the first half of my thesis. The insightful handling of the topic by some legal scholars surprised me. I had not expected my review of legal literature to prove so fruitful. It did,

however, give rise to a further problem: territoriality. Virtually all the legal work has been done on US law, while my initial intention was to focus in UK copyright only. When I began my research I had assumed copyright to be a fairly uniform phenomenon and was not aware of the vastly different historical bases of copyright in different countries. The matter was further complicated by the relative absence of moral rights from Anglo-American copyright. To attempt to give an overall picture of some sort of 'meta-copyright', it was thus necessary to discuss copyright from a French perspective also. This proved problematic as there is a paucity of English language work on French copyright. I have thus been reliant on fewer sources than I would have liked for this part of my thesis. However, I feel that it is not critical to my thesis for two reasons: firstly, there is a certain amount of homogenising copyright law occurring in contemporary society; secondly, it was still my desire to focus on Anglo-American copyright, because it was the exemplar of the processes I have described in the thesis, and with my focus on the popular music industry, the UK and the US are the two most significant countries in this area. Bringing France into the thesis acts as an *a fortiori* example. France could also act as an exemplar of the Romantic author sometimes working against the interests of capital, but the scant literature prevented me from pursuing this avenue.

One omission from this first section is Germany. Germany is important for copyright history because it is where the most philosophical debates surrounding literary property and the nature of authorship occurred, and it is these debates that formed the basis of the *droit moral* as well as being transported into English debates about authorship. However, Germany had to be omitted because of the necessity to limit the thesis to a manageable topic: Kantian and Hegelian notions of intellectual property offer interesting possibilities for future research (Hegel may offer the philosophical link between intellectual property and Radin's work) but would simply have overloaded the thesis.

The literature on bootlegging is problematic, but this was expected. Aside from Heylin's large historical study of bootlegging, there has been minimal work completed on the topic. I found only two academic works (other than legal articles that merely discuss the appropriate laws) that dealt with bootlegging, and both of these focused mainly on taping. The fragmented literature that I could discover on bootlegging stems from magazines and fanzines, legal articles and sections of works on artists that have a bootleg following. The patchwork nature of the available literature was a challenge but gave me the feeling that I was developing something original.

Methodology of the case study

Studying bootleggers and collectors is problematic. As Neumann and Simpson state, 'bootlegging involves a set of practices that often strive to go unnoticed'.¹ However, as I have been part of the subculture of collectors for over ten years (primarily focusing on Dylan and The Stones), some access issues were less problematic for my own research: there was a number of collectors who were willing to share their experiences of collecting with me for my thesis, because of my name already being known as a trader and a writer in these circles. The extensive background knowledge of these artists that I brought with me to the study was also important and helped me ask more intelligent questions because of our shared knowledge. The study may have been more problematic for me had I discussed bootleg collecting with some Madonna fans, say, as I would not have so easily been able to enter a discussion about the aesthetic content of the bootlegs. By sharing an aesthetic world-view with my participants, I was able to understand their point of view more easily.

Nonetheless, this position entailed certain methodological pitfalls, as friends now tried to overly 'academicise' their answers as they thought that was what I wanted. My own position within the group also altered as I became more aware of the reasons which I and the others around me collect bootlegs. My personal views on bootlegging have changed over the course of my research, and this has led to a certain distance between myself and other collectors. By studying my own cohort, I became an outsider within my own group. To quote Cavicchi on the subject, 'many fans think about fandom, of course, but few have written Ph.D. dissertations about it, and the accompanying stamps of class and power are considerable.'²

My methodology for studying bootleg collectors was as follows. Firstly, as well as trying to provide a rationale for why I collected bootlegs, I entered into casual discussions with my immediate circle of collecting friends about the nature of bootleg collecting and the reasons that they collected bootlegs. Following this, I sent a message to two e-mail discussion groups (*Undercover* for Stones' fans and *Raindogs* for Tom Waits' fans) and a Usenet newsgroup (rec.music.dylan) asking for fans to contact me if they collected bootlegs or tapes and were willing to answer a questionnaire for a Ph.D. study. The reason that I chose these groups to approach due to access: I had posted messages to all of these groups before and my name was thus somewhat known. I was

¹ Neumann and Simpson, 1997, p.322.

² Cavicchi, 1998, p.11.

hoping that my insider status would guarantee a response (though despite my assumed insider status, I still received some emails challenging that I was either an FBI or an IFPI agent). I received approximately thirty replies who all filled in an anonymous questionnaire. I followed this up by sending some supplementary questions to a few of the recipients, and began a couple of e-mail 'conversations'.

It is worth questioning whether the questionnaire responses I received are representative of bootleg collectors as a whole. The first question mark is the small number of artists for whom I chose to seek out collectors. While a full study of bootleg collectors would require postings to a greater number of newsgroups, I felt that the artists chosen, as well as giving the most likely response rate for my research, would be fairly representative of the bootleg collector community: Dylan and the Stones are the two most bootlegged acts and Waits has a fan following that is predominantly anti-bootleg and pro-taping. I thought these groups of fans would offer a representative, if small, sample of collectors' views. Secondly, it is possible that my sample is skewed toward those collectors who have a computer. This is true, although the opinions of those I e-mailed and those I interviewed were consistent. The other response to this issue is that, as these people are the biggest fans of their artists, they are likely to have bought a PC because of their fandom: either so that they can participate in the online fan community or because their artist has released a CD-ROM. Nonetheless, this technological skewing of the sample would have to be corrected for a full scale study of bootleg collectors. The third possible challenge to my sample is its demographic: the three artists chosen are all older rock stars who may be assumed to have an older following. This was not supported by my responses, however. The age range of the respondents was evenly spread between 21 and 55.

Whereas access to bootleg collectors was not so much of a problem, access to people involved in bootleg manufacture proved extremely problematic. My gatekeeper in this matter was Clinton Heylin. Heylin is a rock journalist and writer who has written the definitive history of bootlegging. While not a bootlegger himself, Heylin certainly knows many of the people involved. However, the six years between his book and my research has seen a changed climate in bootlegging – from the protection gap years where bootleggers were willing to talk to people about their activities, to the current legal pressure when bootleggers are constantly looking over their shoulder. Heylin said to me in an email that he would be unable to write his book today because of this change in climate, and this is a problem I encountered: I did not get to speak to anyone I would classify as a 'bootleg manufacturer' for this thesis. This is, of course, a problem, though

it is somewhat ameliorated by managing to interview three bootleg retailers, one which I know to have been involved in some manufacturing. Also, three of the respondents to my questionnaire had been involved in manufacture at some point, one of which was an active manufacturer having started his own CDR label. The shortage of manufacturers in this study is, however, a weakness, although I am unsure how I would be able to rectify it in a future study.

Access also proved hard to obtain for official channels. The BPI anti-piracy unit did not respond to my letters and while the IFPI did contact me, the investigator in question, while being generous with his time, was very cagey about giving any information away. This means that much of my 'official viewpoint' in the thesis comes from media releases and articles, which may not provide a wholly accurate reflection of the music industry's attitude to bootlegging. I feel that the nature of my subject created a specific problem for me, in that people I interviewed always thought I was working for the 'other side'. For that reason, I am extremely grateful to those retailers who did offer candid interviews. One of whom was unfortunately busted very shortly after I interviewed him – I feel that this coincidence did not help me gain any further access to bootleggers.

One further problem should be noted regarding the case study: a possible over-reliance on Heylin. To some extent this is unavoidable, Heylin is by far the most knowledgeable person in the world on bootlegging and I was fortunate to be able to conduct a lengthy interview with him early on in my research. Wherever possible, I have tried to corroborate the evidence he gave me through other sources. However, in many instances it has been impossible and I have just had to rely upon his evidence.

To conclude the methodology of the case study: following the interviewing, I undertook participant observation research at a number of record fairs. In particular, I was interested to look at the relationship between retailer and purchaser and on a number of occasions I played the roles of both unsure purchaser and knowledgeable collector to see how the retailers reacted in those different situations. The problem with this approach is that it cannot be continued for too long; bootlegging is a small scale phenomenon and I did not want to gain a reputation for walking round suspiciously at fairs as it was important I was not suspected of being a BPI investigator. The times I did manage to perform this, however, proved to be fruitful research.

Once the first draft of my case study was completed, I sent a copy of it to four people with whom I have traded (two in the UK, one in Holland and one in Sweden) and asked them to read it to see if they thought if it was an accurate portrayal of what they

did. All responded positively, and one UK trader sent me back a carefully annotated copy which proved valuable for future drafts.

Political relevance

Although much of this thesis is theoretical, I do believe that it has an important current relevance. I do not want to revisit the hyperbolic statements about the liberating power of the internet that currently abound, but it seems that we are at a point where copyright is at a crossroads where we are either going to intensify the rights of either the rights holders or increase the rights of the public. Copyright is currently under threat and unstable, so it is going to have to be either strengthened or watered down to work successfully in the digital era. History, of course, as well as the theoretical arguments in this thesis, point to a strengthening of rights holders' rights. This could prove extremely damaging to any public right in copyright, for current moves seem to be heading toward commodifying access to specific works rather than ownership of the object – we could be heading into a type of cyberspace feudalism.³ We are entering into a new phase of copyright protection and it is thus crucial that research such as this thesis continues in the face of current pressures to remove private users' rights to anything except being able to hear a record. The concept of the 'celestial jukebox' may prove to be extremely apt for when you put money into a jukebox, you own nothing but the right to hear the song.⁴

The accelerating dwindling of the public right can be seen in proposed amendments to European copyright legislation discussed in January 2001. These amendments, driven by music industry lobbying, would 'harmonise' the performers' and the authors' rights, as well as further limit individual usage by redefining 'private use' to relate solely to the purchaser's usage.⁵

The moral panic surrounding the notion of 'digitalisation' in the music industry has enabled record companies to intensify the processes that I have discussed in this thesis. In particular, the industry is trying to 'unite' the 'interests' of the industry and its artists even further to gain a stronger grip on its commodity. Thus writers such as Agnew write 'it would appear to be in the best interests of authors and performers to allow for the copyright in sound recordings to vest initially in the producer.'⁶ Such developments

³ This point was made to me by Martin Kretschmer.

⁴ The phrase 'celestial jukebox' comes from the title of a book by Paul Goldstein.

⁵ Amendments 5-197 of European directive 95/12/1/2000 – C5-0520 – 1997/0359(COD), 17/1/01.

⁶ Agnew, 1992, p.132.

are extremely problematic for any notion of the public's right in copyright. And while I do not expect this thesis to change the world, or bring down the system of copyright, I do hope that it can add to the small body of literature that stands in the way of current pressures and offers alternative conceptions to legislators.

As regards bootlegging, this thesis does not seek to legitimate bootlegging and, indeed, as should be apparent from the conclusion, it could not. However, one of the reasons for conducting this research was to present an alternative description of bootlegging to the popular conception. The vast majority of non-fans that I speak to have a view of bootlegs as being terrible sounding and bootlegging being high-level crime. It is hoped that this thesis can offer an alternative, more accurate vision of how bootlegging really exists and provide a voice against official rhetoric.

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